TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 196.

THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, PETITIONERS,

vs.

THE HOME SAVINGS BANK.

ON WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR CERTIORARI FILED MARCH 19, 1898.

CERTIORARI AND RETURN FILED APRIL 4, 1898.

(16,000)

(23,585)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 126.

THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, PETITIONER,

vs.

THE HOME SAVINGS BANK.

ON WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 9, 1914.

a Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the September Term, 1912, of said Court, before the Honorable Elmer B. Adams and the Honorable Walter I. Smith, Circuit Judges, and the Honorable Henry T. Reed, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the twenty-third day of December, A. D. 1910, a transcript of record, pursuant to a writ of error directed to the Circuit Court of the United States for the District of Colorado, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein The Board of County Commissioners of the City and County of Denver is Plaintiff in Error, and The Home Savings Bank is Defendant in Error, which said transcript is in the words and figures following, to-wit:

1 Pleas in the Circuit Court of the United States for the District of Colorado, Sitting at Denver.

Be it remembered, that heretofore, and on, to-wit, the thirty-first day of August, A. D. 1909, came The Home Savings Bank by Charles W. Waterman, Esquire, its attorney, and filed in said court its complaint; and sued out of and under the seal of said court a writ of summons against The Board of County Commissioners of the City and County of Denver.

And the said complaint is in words and figures as follows, to-wit:

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States within and for said District, Sitting at Denver.

THE HOME SAVINGS BANK, Plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Defendant.

Complaint.

Comes now the plaintiff, and complains of the defendant, and for cause of action alleges:

That the plaintiff is now, and at all the times mentioned in the complaint was, a corporation organized and existing under and by

virtue of the laws of the state of Michigan, and is now, and was during all the times herein mentioned, a citizen and resident of the said state of Michigan.

That the City and County of Denver, the defendant herein, is now, and at all the times herein mentioned was, a municipal corporation organized and existing under and by virtue of the constitution and laws of the state of Colorado, and is now, and at all the times herein mentioned was, a citizen and resident of the said state of Colorado.

That the sum or value in dispute in this action exceeds, exclusive of interest and costs, the sum or value of two thousand dollars ($2000.00).

That on or about the 20th day of February, A. D. 1908, the defendant, The City and County of Denver, thereunto duly and fully authorized and empowered by the constitution and laws of the state of Colorado, executed, issued, negotiated and delivered to the
2 Federal Ballot Machine Company (hereinafter called the "Machine Company"), which was then, and ever since has been, a corporation organized and existing under and by virtue of the laws of the state of California, and a citizen and resident of said state of California, its certain negotiable bond or certificate of indebtedness, wherein and whereby the defendant undertook and promised to pay to the order of the Machine Company, at the office of the county treasurer of the defendant, at Denver, Colorado, in one (1) year, the sum of eleven thousand two hundred and fifty dollars ($11,250.00) with interest on that sum from the date thereof at the rate of five per cent (5%) per annum, payable semi-annually, as per two coupons attached thereto; which said negotiable bond or certificate of indebtedness the Machine Company sold, negotiated, transferred, endorsed and delivered to the plaintiff, for value, prior to the 20th day of February, A. D. 1909, and the plaintiff ever since has been, and is now the owner and holder thereof.

That the said negotiable bond or certificate of indebtedness, together with the endorsements thereon, was and is in the words and figures following, to-wit:

$11,250.00. Certificate of Indebtedness No. 1.

City and County of Denver, State of Colorado.

The Federal Ballot Machine Company having presented its claim, for furnishing ballot machines, against the City and County of Denver, in the sum of eleven thousand two hundred and fifty dollars and the same having been allowed at a regular meeting of the Board of County Commissioners of the City and County of Denver, state of Colorado, on the seventeenth day of February, 1908, and the Board of County Commissioners being authorized thereto by the laws of the state of Colorado, Act of 1905, thereby issues its certificate of indebtedness for the said sum, and will in one (1) year pay to the order of the Federal Ballot Machine Company the sum of eleven thousand two hundred and fifty dollars, with interest on this sum, from the date hereof, at the rate of five per cent. per annum; the said interest payable semi-annually, as per two (2) coupons,

hereto attached. Interest and principal payable at the office of the County Treasurer of the City and County of Denver, Colorado. This certificate is one of a series of ten issued in like sum, payable annually.

Signed by the Board of County Commissioners of the City and County of Denver, of the state of Colorado, by its chairman, and attested by the county clerk and recorder with the seal of the
3 county, authorized thereto by resolution of the 20th day of February, 1908.

Denver, Colorado, February 20th, 1908.

BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER,
By S. D. C. HAYS, *Chairman.*

Attest:
[SEAL.] ALBION K. VICKERY,
County Clerk and Recorder of the City and County of Denver, Colorado.

Endorsed: Pay to the order of The Home Savings Bank, Detroit, Mich. Federal Ballot Mach. Co., A. Andrew, Vice-Pres't.

That on the 23rd day of February, A. D. 1909, the said negotiable bond or certificate of indebtedness was presented at the office of the county treasurer of the defendant, The City and County of Denver, at Denver, Colorado, and payment demanded, and payment then and there was refused by the defendant, and thereupon, the said negotiable bond or certificate of indebtedness was duly protested for nonpayment, and the plaintiff paid protest fees on account thereof, in the sum of three dollars and seventy-five cents ($3.75).

That the defendant has not paid the said negotiable bond or certificate of indebtedness, nor any part thereof, and the entire principal sum thereof, to-wit, eleven thousand two hundred and fifty dollars ($11,250.00), still remains due and unpaid.

Wherefore, The plaintiff prays judgment against the defendant for the sum of eleven thousand two hundred and fifty dollars ($11,250.00), together with interest thereon from and after the 20th day of February, A. D. 1909; for the further sum of three dollars and seventy-five cents ($3.75) paid by the plaintiff as protest fees, and for costs of this action.

II.

For a Second Cause of Action Against the Defendant, the Plaintiff alleges:

That on or about the 20th day of February, A. D. 1908, the defendant, The City and County of Denver, thereunto duly and fully authorized and empowered by the constitution and laws of the state of Colorado, executed, issued, negotiated and delivered to the Federal Ballot Machine Company (hereinafter called the "Machine
4 Company"), which was then, and ever since has been, a corporation organized and existing under and by virtue of the

laws of the state of California, and a citizen and resident of said state of California, its certain negotiable bond or certificate of indebtedness, wherein and whereby the defendant promised to pay to the order of the Machine Company, at the office of the county treasurer of the defendant, at Denver, Colorado, in one year, the sum of eleven thousand two hundred and fifty dollars ($11,250.00), with interest on that sum from the date thereof at the rate of five per cent (5%) per annum, payable semi-annually, as per two coupons attached thereto.

That the said negotiable bond or certificate of indebtedness was and is in words and figures following, to-wit:

Certificate of Indebtedness.

$11,250.00 No. 1.

City and County of Denver, State of Colorado.

The Federal Ballot Machine Company having presented its claim, for furnishing ballot machines, against the City and County of Denver, in the sum of eleven thousand two hundred and fifty dollars, and the same having been allowed at a regular meeting of the board of County Commissioners of the City and County of Denver, state of Colorado, on the seventeenth day of February, 1908, *and* the Board of County Commissioners, being authorized thereto by the laws of the state of Colorado, Act of 1905, hereby issues its certificate of indebtedness for the said sum, and will in one (1) year pay to the order of the Federal Ballot Machine Company the sum of eleven thousand two hundred and fifty dollars, with interest on this sum, from the date hereof, at the rate of five per cent. per annum; the said interest payable semi-annually, as per two (2) coupons, hereto attached. Interest and principal payable at the office of the county treasurer of the City and County of Denver, Colorado. This certificate is one of a series of ten issued in like sum, payable annually.

Signed by the Board of County Commissioners of the City and County of Denver, of the state of Colorado, by its chairman, and attested by the county clerk and recorder with the seal of the county, authorized thereto by resolution of the 20th day of February, 1908.

Denver, Colorado, February 20th, 1908.

BOARD OF COUNTY COMMISSIONERS OF
THE CITY AND COUNTY OF DENVER,
By S. D. C. HAYS, *Chairman.*

Attest:
[SEAL.] ALBION K. VICKERY,
County Clerk and Recorder of the City and County of Denver, Colorado.

5 That coupon No. 2, attached to said negotiable bond or certificate of indebtedness when issued and negotiated, and which covered six months' interest upon said bond, became due and payable by its terms, on the 20th day of February, A. D. 1909, at the office of the county treasurer of the defendant.

That in and by said interest coupon the defendant promised to pay to the order of the Machine Company, at the office of the county treasurer of the defendant, on the 20th day of February, A. D. 1909, the sum of two hundred eighty-one dollars and twenty-five cents ($281.25), and said interest coupon was executed, issued, negotiated and delivered to the Machine Company with said bond.

That the Machine Company sold, negotiated, transferred, endorsed and delivered to the plaintiff the said interest coupon, for value prior to the 20th day of February, A. D. 1909, and the plaintiff ever since has been, and is now, the owner and holder thereof.

That the said interest coupon, together with the endorsements thereon, was and is in the words and figures following, to-wit:

On the 20th day of February, 1909, the Board of County Commissioners of the city and county of Denver, state of Colorado, will pay to the order of The Federal Ballot Machine Company, at the office of the county treasurer of the City and County of Denver, Colorado, two hundred eighty-one and one quarter dollars, being six months' interest to that date on certificate of indebtedness No. 1 for $11,250.00.

BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, COLORADO,
By S. D. C. HAYS, *Chairman.*

$281.25.
2

Attest:
ALBION K. VICKERY,
County Clerk and Recorder of the City and County of Denver, Colorado.

Endorsed: Federal Ballot Mch. A. Andrew, Vice-Pres't.

That on the 23rd day of February, A. D. 1909, the said interest coupon was presented at the office of the county treasurer of the defendant, The City and County of Denver, at Denver, Colorado, and payment demanded, and payment then and there was refused by the defendant; and thereupon, the said interest coupon
6 was duly protested for non-payment, and the plaintiff paid protest fees on account thereof in the sum of three dollars and seventy-five cents ($3.75).

That the defendant has not paid the said interest coupon nor any part thereof, and the entire principal sum thereof, to-wit, two hundred eighty-one dollars and twenty-five cents ($281.25), together with interest thereon since the 20th day of February, 1909, still remains due and unpaid.

Wherefore, the plaintiff prays judgment against the defendant for the sum of two hundred and eighty-one dollars and twenty-five cents ($281.25), together with interest on that sum from and after the 20th day of February, A. D. 1909, for the further sum of three

dollars and seventy-five cents ($3.75) paid by the plaintiff as protest fees; and for the costs of this action.

CHARLES W. WATERMAN,
Attorney for the Plaintiff.

STATE OF COLORADO,
City and County of Denver, ss:

Charles W. Waterman, of lawful age, being first duly sworn, on oath doth depose and says: That the plaintiff is a corporation organized and existing under and by virtue of the laws of the state of Michigan; that affiant is the plaintiff's attorney, by it retained to prosecute this action, and authorized to make this verification, that he has read the foregoing complaint, and knows the contents thereof, and that the matters and things therein set forth are true to the best knowledge and belief of affiant.

CHARLES W. WATERMAN.

Subscribed and sworn to before me this 31st day of August, A. D. 1909. My commission expires April 1st, 1911.

[NOTARIAL SEAL.] J. AUGUSTIN GALLAHER,
Notary Public.

Endorsed: No. 5388. U. S. Circuit Court of Colorado. The Home Savings Bank, plaintiff, vs. The Board of County Commissioners of the City and County of Denver, defendant. Complaint. Filed Aug. 31, 1909. Charles W. Bishop, Clerk. Charles W. Waterman, Counselor at Law, Denver, Colorado.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States for the District of Colorado.

7 THE HOME SAVINGS BANK, Plaintiff,
versus
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Defendant.

Complaint Filed in the Clerk's Office This 31st Day of August, A. D. 1909.

The President of the United States of America to the Defendant above named, Greeting:

You are hereby notified that an action has been brought in said court, by the above named plaintiff against you as defendant to recover the sum of eleven thousand, two hundred and fifty dollars ($11,250.00) due the defendant on a certain certificate of indebtedness for $11,250.00 issued to the Federal Ballot Machine Company by said defendant on the 20th day of February, 1908, which said certificate was by the Federal Ballot Machine Company duly transferred to the plaintiff; together with interest on said sum from the

20th day of February, 1909, and for the further sum of three dollars and seventy-five cents ($3.75) protest fees paid by plaintiff; also the further sum of two hundred eighty-one dollars and twenty-five cents ($281.25) due the plaintiff from the defendant on a certain interest coupon attached to said certificate of indebtedness, together with interest on said sum of $281.25 from the 20th day of February, 1909, for the further sum of $3.75 protest fees paid by plaintiff; and for costs of this action, as more fully set forth and described in the complaint filed herein and to which reference is here made.

You are hereby required to appear and demur or answer to the complaint filed in said action, in said court, within thirty days (exclusive of the day of service) after this summons shall be served on you, and if you fail so to do, the said plaintiff will take judgment against you by default, according to the prayer of the said complaint.

Witness, The Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of the said Circuit court at the City and County of Denver, in said district, this 31st day of August, A. D. 1909, and of the independence of the United States the 134th year.

[Seal U. S. Cir. Court.]

CHARLES W. BISHOP, *Clerk,*
By ALBERT TREGO,
Deputy Clerk.

8 *Proof of Service.*

UNITED STATES OF AMERICA,
District of Colorado, ss:

DENVER, COLORADO, Sept. 2, A. D. 1909.

I hereby certify, that I received the within writ on the 1st day of Sept. A. D. 1909, and that I have personally served the same upon the said defendant The Board of County Commissioners of the City and County of Denver by delivering to Fred W. Bailey, County Clerk of the City and County of Denver and each of them personally, a true copy of the within writ, at the time and place as follows: As to Fred W. Bailey at Denver, County of Denver on the 1st day of Sept. A. D. 1909.

D. C. BAILEY, *Marshal,*
By E. F. HIGHLAND,
Deputy Marshal.

Endorsed: No. 5388. United States Circuit Court, for the District of Colorado. The Home Savings Bank, Plaintiff, versus The Board of County Commissioners of the City and County of Denver, Defendant. Summons. Filed Sept. 2, 1909. Charles W. Bishop, Clerk. Charles W. Waterman, of Denver, Attorney for plaintiff.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court.

THE HOME SAVINGS BANK, Plaintiff,
v.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Defendant.

Motion.

Comes now the defendant in the above entitled action, by its attorneys, Milton Smith and Charles R. Brock, and moves the court to strike from the complaint the word "negotiable" as used in line 7, line 14 and line 19, on page 2, line 24 and line 31, on page 3, line 15, and line 23, on page 4, and line 27, on page 5 of said complaint, and also moves the court to strike from said complaint the following language found on page 3 of said complaint, to-wit:

and thereupon the said negotiable bond or certificate of indebtedness was duly protested for non-payment, and the plaintiff paid protest fees on account thereof in the sum of three dollars and seventy-five ($3.75).

9 And the defendant also moves to strike from the complaint the following language found on page 6 thereof, to-wit:

and thereupon the said interest coupon was duly protested for non-payment, and the plaintiff paid protest fees on account thereof in the sum of three dollars and seventy-five cents ($3.75).

And for ground of this motion the defendant shows to the court, that the use of the word "negotiable" is merely the expression of an erroneous legal conclusion as to the character of the instruments which are the basis of this action, and the word "negotiable" is therefore irrelevant; that it affirmatively appears from the complaint that the instruments sued on are not negotiable, and neither thereof could be legally protested for non-payment, and the allegations of the complaint in respect to the charge and payment of protest fees, which the defendant by this motion seeks to have stricken from the complaint, are wholly irrelevant and immaterial, and are mere surplusage.

MILTON SMITH &
CHAS. R. BROCK,
Attorneys for Defendant.

Endorsed: No. 5388. In the Circuit Court of the United States. The Home Savings Bank, plaintiff v. The Board of County Commissioners, defendant. Motion to Strike Portions of Complaint. Filed Oct. 1, 1909, Charles W. Bishop, Clerk. Milton Smith, Chas. R. Brock, Attorneys for defendant.

Sixtieth Day, May Term, Monday, October 18th, A. D. 1909.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the fourth day of May, A. D. 1909.

No. 5388.

THE HOME SAVINGS BANK, Plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER.

Money Demand.

At this day comes the plaintiff by Charles W. Waterman, Esquire, its attorney, and the defendant by Charles R. Brock, Esquire, its attorney, also comes. And the motion to strike out certain portions of the complaint coming on now to be heard is argued by counsel. And the court having considered the same and being now fully advised in the premises:

It is ordered by the court, for good and sufficient reasons to the court appearing, that said motion be, and the same is hereby, denied.

It is further ordered by the court that the defendant answer the complaint herein within twenty (20) days from this day.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States within and for said District, Sitting at Denver.

THE HOME SAVINGS BANK, Plaintiff,
v.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Defendant.

Answer.

Comes now the defendant in the above entitled action, and for answer and defense to the complaint states:

I.

For a First Defense.

That it has not and cannot obtain knowledge or information sufficient to form a belief as to whether the Federal Machine Company negotiated, transferred, endorsed or delivered to the plaintiff, for value or otherwise, or at all, prior to the 20th day of February, 1909, or at any time, the bond or certificate of indebtedness in the

complaint mentioned, or as to whether the plaintiff ever since has been or is now the owner or holder thereof, and states that it has not and cannot obtain sufficient knowledge or information upon which to base a belief as to whether the machine company sold, negotiated, transferred, endorsed or delivered to the plaintiff for value or otherwise or at all, prior to the 20th day of February, A. D. 1909, or at any time, the interest coupon in the complaint mentioned, or as to whether the plaintiff ever since has been or is now the owner or holder thereof.

II.

For a Second Defense.

The defendant alleges upon information and belief, that the plaintiff is prosecuting this action under an agreement with the Federal Ballot Machine Company, or with some one acting in its behalf, but whose name is to the defendant unknown, to the effect that the plaintiff shall be indemnified and saved harmless against the cost and expense of this action, and that the said Federal Ballot Machine Company is the real party in interest in this action.

11 The defendant further alleges, that the consideration for the execution of both the certificate of indebtedness and interest coupon in the complaint mentioned, has wholly failed. That said instruments were executed in part payment for one hundred and fifty (150) voting machines, known as the Dean Ballot Machines, under an agreement made and entered into between the Federal Ballot Machine Company and this defendant on the 27th day of May, A. D. 1907. That by said agreement the said Federal Ballot Machine Company undertook and guaranteed that each of said machines should conform in every particular to the constitution and statutes of the state of Colorado with respect to the holding of elections by means of said machines, and that they would perfectly and accurately perform the work of voting machines as required by said laws. That said machines do not conform in every particular to the requirements of the constitution and statutes of the state of Colorado in respect to the holding of elections by means of voting machines, and do not perfectly or accurately perform the work as required by said constitution and laws, and that in the use of the said machines the secrecy of the ballot cannot be preserved. That the mechanism of the said machines is so intricate and complicated that an elector cannot vote at all within the limit of one minute. That it is impossible for an elector, by the use of said machines, to vote a straight ticket, mixed ticket or an irregular ticket, or any of them, within said space of time, and it is utterly impossible for an elector by the use of said machines secretly to vote a split or irregular ticket. That the said machines are so constructed that after they have been locked, preparatory for use at an election, they are easily and readily manipulated in such a way as to render possible the placing of fraudulent ballots therein. That their construction is such that an elector cannot cast a vote for presidential electors without first divulging the names of the persons for whom he so desires to vote, and the construction of said machines is such that it is im-

possible for an elector to vote for any particular individual presidential elector. That by the use of said machines it is impossible where there are as many as seven tickets, for an elector to vote for an independent candidate, and it is also impossible by the use of said machines to vote a straight ticket by a single device. The machines do not prevent a voter from voting for a candidate, or on a question for whom or on which he is not entitled to vote. Said machines do not correctly register every vote attempted to be cast either for candidates or on questions submitted to a vote, that said machines are so constructed that if used at an election said ballots cannot be recounted in case of contest, in the manner and form required and contemplated by law, and are without any value whatever.

12 III.

For a Third Defense.

The defendant alleges, that the consideration for the execution of both the certificate of indebtedness and interest coupon in the complaint mentioned, has wholly failed. That said instruments were executed in part payment for one hundred and fifty (150) voting machines, known as the Dean Ballot Machines, under an agreement made and entered into between the Federal Ballot Machine Company and this defendant on the 27th day of May, A. D. 1907. That by said agreement the said Federal Ballot Machine Company undertook and guaranteed that each of said machines should conform in every particular to the constitution and statutes of the state of Colorado with respect to the holding of elections by means of said machines, and that they would perfectly and accurately perform the work of voting machines as required by said laws. That said machines do not conform in every particular to the requirements of the constitution and statutes of the state of Colorado in respect to the holding of elections by means of voting machines, and do not perfectly or accurately perform the work as required by said constitution and law, in that in the use of the said machines the secrecy of the ballot cannot be preserved. That the mechanism of the said machines is so intricate and complicated that an elector cannot vote at all within the limits of one minute. That it is impossible for an elector, by the use of said machines, to vote a straight ticket, mixed ticket or an irregular ticket, or any of them, within said space of time, and it is utterly impossible for an elector by the use of said machines secretly to vote a split or irregular ticket. That the said machines are so constructed that after they have been locked, preparatory for use at an election, they are easily and readily manipulated in such a way as to render possible the placing of fraudulent ballots therein. That their construction is such that an elector cannot cast a vote for presidential electors without first divulging the names of the persons for whom he so desires to vote, and the construction of said machines is such that it is impossible for an elector to vote for any particular individual presidential elector. That by the use of said machines it is impossible, where there are as many as seven tickets, for an elector to vote for an in-

dependent candidate, and it is also impossible by the use of said machines to vote a straight ticket by a single device. The machines do not prevent a voter from voting for a candidate or on a question for whom or on which he is not entitled to vote. Said machines do not correctly register every vote attempted to be cast either for candidates or on questions submitted to a vote, that said ma-
13 chines are so constructed that if used at an election said ballots cannot be recounted in case of contest, in the manner and form required and contemplated by law, and are without any value whatever.

Wherefore, having fully answered, the defendant prays to be hence dismissed, with judgment for its costs in this behalf expended to be taxed.

MILTON SMITH,
CHAS. R. BROCK,
Attorneys for Defendant.

STATE OF COLORADO,
City and County of Denver, ss:

The affiant, John G. Prinzing, being first duly sworn, on oath deposes and says: that he is chairman of the board of county commissioners of the City and County of Denver. That he has read the foregoing answer and knows the contents thereof, and that the allegations therein made are true to the best of his knowledge, information and belief.

JOHN G. PRINZING.

Subscribed and sworn to before me this 11" day of November, A. D. 1909. My commission expires Feb'y 9, 1913.
[NOTARIAL SEAL.] WILLIAM W. HEINEMAN,
Notary Public.

Endorsed: No. 5388. In the circuit court of the United States. The Home Savings Bank, plaintiff, v. The Board of County Commissioners, defendant. Answer. Filed Nov. 11, 1909. Charles W. Bishop, Clerk. Milton Smith, Chas. R. Brock, Attorneys for defendant.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court.

THE HOME SAVINGS BANK, Plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Defendant.

Demurrer to the First, Second, and Third Defenses of the Defendant's Answer.

Comes now the plaintiff, and demurs to the first defense contained in the defendant's answer, and for grounds of demurrer says that

the said first defense does not state facts sufficient to constitute a defense to the cause of action set forth in the plaintiff's complaint.

14 2nd. The plaintiff demurs to the second defense contained in the defendant's answer, and for grounds of demurrer says that the said second defense does not state facts sufficient to constitute a defense to the cause of action set forth in the plaintiff's complaint.

3rd. The plaintiff demurs to the third defense contained in the defendant's answer, and for grounds of demurrer says that the said third defense does not state facts sufficient to constitute a defense to the cause of action set forth in the plaintiff's complaint.

CHARLES W. WATERMAN,
Attorney for the Plaintiff.

Endorsed: No. 5388. U. S. Circuit Court of Colorado. The Home Savings Bank, Plaintiff, vs. The Board of County Commissioners of the City and County of Denver, Defendants. Demurrer to the First, Second and Third Defenses of the Defendant's Answer. Filed Nov. 22, 1909. Charles W. Bishop, Clerk. Charles W. Waterman, Counselor at Law, Denver, Colorado.

Forty-first Day, November Term, Wednesday, January 5th, A. D. 1910.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the second day of November, A. D. 1909.

5388.

THE HOME SAVINGS BANK
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER.

Money Demand.

At this day comes the plaintiff by Charles W. Waterman, Esquire, its attorney, and the defendant by William H. Ferguson, Esquire, its attorney also comes. And the demurrer of the plaintiff to the answer of the defendant comes on now to be heard, and is argued by counsel, and the court having considered the same and being now fully advised in the premises, it seemeth to the court now here that the first and second defenses of the answer of the defendant are sufficient in law to be replied unto, and that the third defense of the answer of the defendant is not sufficient in law to be replied unto, and so the said demurrer is overruled as to the first and second defenses, and sustained as to the third defense of said answer herein:

15 And thereupon, on motion of the defendant, it is ordered by the court, that it may file herein an amendment to the third defense of the answer within twenty (20) days from this day.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States within and for said District, Sitting at Denver.

THE HOME SAVINGS BANK, Plaintiff,
v.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Defendant.

Amended Answer.

Comes now the defendant in the above entitled action, by leave of court first had and obtained, and for amended answer and defense to the complaint alleges:

I.

For a First Defense.

That it has not and cannot obtain sufficient knowledge or information upon which to base a belief as to whether the Federal Ballot Machine Company, or anyone, sold, negotiated, transferred, endorsed or delivered to the plaintiff, for value or otherwise, or at all, prior to the 20th day of February A. D. 1909, or at any time, the bond or certificate of indebtedness in the complaint mentioned, or as to whether the plaintiff ever since has been or at any time has been, or is now, the owner or holder thereof; that it has not and cannot obtain sufficient knowledge or information upon which to base a belief as to whether the Federal Ballot Machine Company, or anyone, sold, negotiated, transferred, endorsed or delivered to the plaintiff, for value or otherwise or at all, prior to the 20th day of February A. D. 1909, or at any time, the interest coupon in the complaint mentioned, or as to whether the plaintiff ever since has been or at any time has been or is now the owner or holder thereof.

II.

For a Second Defense.

The defendant further alleges, that the consideration for the execution of both the certificate of indebtedness and interest coupon in the complaint mentioned has wholly failed. The said instruments were executed in part payment for one hundred and fifty
16 (150) voting machines, known as the Dean Ballot Machines, under an agreement made and entered into between the Federal Ballot Machine Company and this defendant on the 27th day of May A. D. 1907. That by said agreement the said Federal Ballot Machine Company undertook and guaranteed that each of said machines should conform in every particular to the constitution and

statutes of the state of Colorado with respect to the holding of elections by means of said machines, and that they would perfectly and accurately perform the work of voting machines as required by said laws. That said machines do not conform in every particular to the requirements of the constitution and statutes of the state of Colorado in respect to the holding of elections by means of voting machines, and do not perfectly or accurately perform the work as required by said constitution and laws, in that in the use of the said machines the secrecy of the ballot cannot be preserved. That the mechanism of the said machines is so intricate and complicated that an elector cannot vote at all within the limit of one minute. That [*is*] is impossible for an elector by the use of said machines, to vote a straight ticket, mixed ticket or an irregular ticket, or any of them, within said space of time, and it is utterly impossible for an elector by the use of said machines secretly to vote a split or irregular ticket. That the said machines are so constructed that after they have been locked, preparatory for use at an election, they are easily and readily manipulated in such a way as to render possible the placing of fraudulent ballots therein. That their construction is such that an elector cannot cast a vote for presidential electors without first divulging the names of the persons for whom he so desires to vote, and the construction of said machines is such that it is impossible for an elector to vote for any particular individual presidential elector. That by the use of said machine it is impossible, where there are as many as seven tickets, for an elector to vote for an independent candidate, and it is also impossible by the use of said machines to vote a straight ticket by a single device. The machines do not prevent a voter from voting for a candidate, or on a question for whom or on which he is not entitled to vote. Said machines do not correctly register every vote attempted to be cast either for candidates or on questions submitted to a vote. That said machines are so constructed that if used at an election said ballots cannot be recounted in case of contest, in the manner and form required and contemplated by law, and are without any value whatever.

Upon information and belief the defendant alleges, that the Federal Ballot Machine Company is now and was at the time of the institution of this action, the beneficial owner of the bond or
17 certificate of indebtedness and the interest coupon in the complaint set forth; that neither thereof was before maturity, or at any time, in good faith and in due course of business negotiated, sold or transferred by the Federal Ballot Machine Company or anyone, to the plaintiff or anyone; that any transfer or delivery thereof, if any transfer or delivery thereof was ever at any time made, was for the sole purpose of enabling the plaintiff in its own name to prosecute this action, for the purpose of thereby defeating the defense which the Federal Ballot Machine Company knew existed as against itself, and of which the plaintiff had notice prior to any alleged negotiation, transfer or delivery thereof to the plaintiff; and that this action is now being prosecuted by the plaintiff in pursuance of an agreement which was made between the Federal Ballot Machine Company and the plaintiff at or prior to any alleged negotia-

tion, transfer or delivery of said writings to the plaintiff for the use and benefit of the said Federal Ballot Machine Company; and that if the plaintiff is now the holder of said bond or certificate of indebtedness or coupon in the complaint described it took the same solely for the purpose of collection, with full knowledge and notice of all the defenses and equities existing between the defendant and the said Federal Ballot Machine Company, and particularly the failure of the consideration for said obligations hereinbefore more particularly alleged, and that the plaintiff is not the real party in interest.

III.

For a Third Defense.

The defendant alleges, that the consideration for the execution of both the certificate of indebtedness and interest coupon in the complaint mentioned, has wholly failed. That said instruments were executed in part payment for one hundred and fifty (150) voting machines, known as the Dean Ballot Machines, under an agreement made and entered into between the Federal Ballot Machine Company and this defendant on the 27th day of May, A. D. 1907. That by said agreement the said Federal Ballot Machine Company undertook and guaranteed that each of said machines should conform in every particular to the constitution and statutes of the state of Colorado with respect to the holding of elections by means of said machines, and that they would perfectly and accurately perform the work of voting machines as required by said laws. That said machines do not conform in every particular to the requirements of the constitution and statutes of the state of Colorado in respect to the holding of elections by means of voting machines, and do
18 not perfectly or accurately perform the work as required by said constitution and laws, in that in the use of the said machines the secrecy of the ballot cannot be preserved. That the mechanism of the said machines is so intricate and complicated that an elector cannot vote at all within the limit of one minute. That it is impossible for an elector, by the use of said machines, to vote a straight ticket, mixed ticket or an irregular ticket, or any of them, within said space of time, and it is utterly impossible for an elector by the use of said machines secretly to vote a split or irregular ticket. That the said machines are so constructed that after they have been locked, preparatory for use at an election, they are easily and readily manipulated in such a way as to render possible the placing of fraudulent ballots therein. That their construction is such that an elector cannot cast a vote for presidential electors without first divulging the names of the persons for whom he so desires to vote, and the construction of said machines is such that it is impossible for an elector to vote for any particular individual presidential elector. That by the use of said machines it is impossible, where there are as many as seven tickets, for an elector to vote for an independent candidate, and it is also impossible by the use of said machines to vote a straight ticket by a single device. The machines do not prevent a voter from

voting for a candidate or on a question for whom or on which he is not entitled to vote. Said machines do not correctly register every vote attempted to be cast either for candidates or on questions submitted to a vote. That said machines are so constructed that if used at an election said ballots cannot be recounted in case of contest, in the manner and form required and contemplated by law, and are without any value whatever.

Wherefore, having fully answered, the defendant prays to be hence dismissed, with judgment for its costs in this behalf expended to be taxed.

MILTON SMITH,
CHAS. R. BROCK,
Attorneys for Defendant.

STATE OF COLORADO,
City and County of Denver, ss:

The affiant, W. P. Quarterman, being first duly sworn, on oath deposes and says.

That he is chairman of the board of county commissioners of the City and County of Denver.

That he has read the foregoing answer and knows the contents thereof, and that the allegations therein made are true to the best of his knowledge, information and belief.

W. P. QUARTERMAN.

Subscribed and sworn to before me this 12th day of January, A. D. 1910. My commission expires Mar. 6, 1910.

[NOTARIAL SEAL.] WM. WALLIS PLATT,
Notary Public.

Endorsed: No. 5388. In the U. S. Circuit Court for the district of Colorado. The Home Savings Bank, Plaintiff, v. The Board of County Commissioners of the City and County of Denver, Defendant. Amended Answer. Filed Jan. 12, 1910. Charles W. Bishop, Clerk. Milton Smith, Chas. R. Brock, Attorneys for defendant.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States within and for said District, Sitting at Denver.

THE HOME SAVINGS BANK, Plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Defendant.

Demurrer to Amended Answer.

Comes now the plaintiff above named, by its attorney, and demurs to the first defense set forth in the defendant's amended answer, and

for grounds of such demurrer says: that the said first defense does not state facts sufficient to constitute a defense to either the first or the second cause of action set forth in the plaintiff's complaint.

II.

The plaintiff demurs to the second defense set forth in the defendant's amended answer, and for grounds of demurrer says: that the said second defense does not contain or state facts sufficient to constitute a defense to either the first cause of action or the second cause of action set forth in the plaintiff's complaint.

III.

The plaintiff demurs to the third defense set forth in the defendant's amended answer, and for grounds of demurrer says: that the said third defense does not contain or state facts sufficient to
20 constitute a defense to either the first cause of action or the second cause of action set forth in the plaintiff's complaint.

CHARLES W. WATERMAN,
Attorney for the Plaintiff.

Endorsed: No. 5388. U. S. Circuit Court of Colorado. The Home Savings Bank, Plaintiff, vs. The Board of County Commissioners of the City and County of Denver, Defendant. Demurrer to Amended Answer. Filed Jan. 19, 1910. Charles W. Bishop, Clerk. Charles W. Waterman, Counselor at Law, Denver, Colorado.

Fifty-seventh Day, November Term, Thursday, January 27, A. D. 1910.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the second day of November, A. D. 1909.

5388.

THE HOME SAVINGS BANK
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER.

Money Demand.

At this day comes the plaintiff by Charles W. Waterman, Esquire, its attorney, and the defendant by Charles R. Brock, Esquire, its attorney also comes. And the demurrer to the amended answer herein coming on now to be heard, is argued by counsel, and thereupon and on consideration thereof, it seemeth to the court now here that the first and second defenses of the defendant's amended answer are sufficient in law to be replied unto, and that the third defense in defendant's said amended answer is not sufficient in law to be replied unto, and so the said demurrer is hereby overruled as to the first and

second defenses, and sustained as to the third defense of the amended answer herein.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States within and for said District, Sitting at Denver.

THE HOME SAVINGS BANK, Plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Defendant.

Replication to the Second Defense of the Amended Answer.

21 Comes now the plaintiff, by its attorney, and for replication to the second defense set forth in the defendant's amended answer, says:

Plaintiff denies each and every allegation contained in the second defense set forth in the defendant's amended answer.

Wherefore, The plaintiff prays judgment as prayed for in its complaint.

CHARLES W. WATERMAN,
Attorney for the Plaintiff.

STATE OF COLORADO,
City and County of Denver, ss:

Charles W. Waterman, of lawful age, being first duly sworn, on oath doth depose and say: That the plaintiff above named is a corporation; that he is the attorney for the plaintiff, and authorized to make this verification; that he has read the foregoing replication and knows the contents thereof, and that the matters and things therein set forth are true to the best of his knowledge, information and belief.

CHARLES W. WATERMAN.

Subscribed and sworn to before me this 7th day of March, A. D. 1910.

[NOTARIAL SEAL.] J. AUGUSTIN GALLAHER,
Notary Public.

My commission expires April 1st, 1911.

Endorsed: No. 5388. U. S. Circuit Court of Colorado. The Home Savings Bank, Plaintiff, vs. The Board of County Commissioners of the City and County of Denver, Defendant. Replication to the second defense of the amended answer. Filed Mar. 8, 1910. Charles W. Bishop, Clerk. Charles W. Waterman, Counsellor at Law, Denver, Colorado.

Forty-third Day, May Term, Tuesday, August 2nd, A. D. 1910.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the third day of May, A. D. 1910.

5388.

THE HOME SAVINGS BANK
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER.

Money Demand.

At this day come- plaintiff by Charles W. Waterman, Esquire, its attorney, and the defendant by William H.
22 Ferguson, Esquire, its attorney, also comes. And thereupon comes a jury, to-wit:

Thomas Foster,	Charles E. Levingston,
S. N. Hicks,	E. E. Watts,
Edward M. Cookerly,	Charles W. Linsley,
C. P. Peter,	John G. Jansen,
Charles W. Keith,	J. F. Boynton,
Frederick L. Cretney,	James H. Berryman,

twelve good and lawful men, and they are each duly selected and tried, empanelled and sworn to well and truly try the issues herein joined and a true verdict render according to the law and the evidence. And thereupon, on motion of the plaintiff, it is ordered by the court that all depositions now in the office of the clerk of this court in this case, be opened, published, and filed, which is accordingly done.

And thereupon comes the evidence. And the court having heard the evidence produced herein and being now fully advised in the premises; it is ordered by the court that judgment be entered herein in favor of the plaintiff and against the defendant as upon a verdict of the jury in the sum of twelve thousand three hundred and seventy-four dollars and seventy-six cents ($12,374.76).

Wherefore, it is considered by the court, as upon a verdict of the jury, that the plaintiff do have and recover of and from the defendant the sum of twelve thousand three hundred and seventy-four dollars and seventy-six cents ($12,347.76), its damages by it sustained by occasion of the premises in its complaint herein set forth and alleged, in form aforesaid assessed, together with its costs by it in this behalf laid out and expended to be taxed.

5388.

THE HOME SAVINGS BANK
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER.

Money Demand.

On this second day of August, A. D. 1910, the same being one of the regular juridical days of the May, 1910, term of this court there being present the Honorable Robert E. Lewis, District Judge,

It is considered by the court, as upon a verdict of the jury that the plaintiff do have and recover of and from the defendant the sum of twelve thousand three hundred and seventy-four dollars and seventy-six cents ($12,374.76) its damages by it sustained by
23 occasion of the premises in its complaint herein set forth and alleged in form aforesaid assessed, together with its costs by it in this behalf laid out and expended, to be taxed.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States.

THE HOME SAVINGS BANK
v.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Defendant.

Motion for New Trial.

Comes now the defendant in the above entitled action, by its attorneys Milton Smith and Charles R. Brock, and moves the court to set aside the verdict of the jury and the judgment entered thereon and to grant a new trial in the above entitled case, and for grounds of said motion alleges:

1. That the court erred in denying defendant's motion to strike from the complaint the word "negotiable" as used in line 7, line 14, and line 19 on page 2; line 24 and line 31 on page 3; line 15 and line 23 on page 4; and line 27 on page 5 of said complaint.

2. The court erred in overruling the defendant's motion to strike out the following language found on page 3 of said complaint, to-wit:

Thereupon the said negotiable bond or certificate of indebtedness was duly protested for non-payment and the plaintiff paid the protest fees on account thereof in the sum of three dollars and seventy-five cents ($3.75).

3. The court erred in overruling the defendant's motion to strike out the following language found on page 6 of said complaint, to-wit:

And thereupon said interest coupon was duly protested for non-payment and the plaintiff paid protest fees on account thereof in the sum of three dollars and seventy-five cents ($3.75).

4. The court erred in sustaining the demurrers of the plaintiff to the third defense contained in both the original and the amended answer.

5. The court erred in ruling that the instruments sued on in the complaint were negotiable.

24 6. The court erred in overruling the defendant's motion for a non-suit.

7. The court erred in overruling the defendant's motion for a directed verdict.

8. The court erred in granting plaintiff's motion for a directed verdict.

9. That the verdict is contrary to the evidence, and the judgment is contrary to law.

MILTON SMITH,
CHAS. R. BROCK, AND
WM. H. FERGUSEN,
Attorneys for Defendant.

Endorsed: 5388. In the Circuit Court of the United States. The Home Savings Bank, plaintiff, v. The Board of County Commissioners of the City and County of Denver. Motion for New Trial. Filed Aug. 5, 1910. Charles W. Bishop, Clerk.

Forty-sixth Day, May Term, Friday, August 5th, A. D. 1910.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the third day of May, A. D. 1910.

5388.

THE HOME SAVINGS BANK
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER.

Money Demand.

At this day comes the defendant by William H. Ferguson, Esquire, its attorney, no one appearing for or on behalf of the plaintiff. And the motion for a new trial of the issues herein joined coming on now to be heard, is submitted to the court, and the court having considered the same and being now fully advised in the premises;

It is ordered by the court, for good and sufficient reasons to the court appearing, that the said motion be, and the same is hereby, denied.

And thereupon, on motion of the defendant, it is ordered by the court that it have day *and* to and including thirty (30) days from this day within which to file herein a bill of the exceptions reserved by it upon the trial of the issues herein joined; and supersedeas bond

on writ of error shall be in the sum of fifteen thousand dollars ($15,000).

25 UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States within and for the District of Colorado.

No. 5388.

HOME SAVINGS BANK, Plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Defendant.

Defendant's Bill of Exceptions.

Be It Remembered, that on the Second day of August, A. D. 1910, the same being one of the juridical days of the regular May, A. D. 1910, term of the Circuit Court of the United States within and for the District of Colorado, sitting at Denver, Colorado, the above entitled cause came on for trial before the Honorable Robert E. Lewis, Judge of said Court, the plaintiff appearing by Charles W. Waterman, Esquire, its attorney, and the defendant by William H. Ferguson, Esquire, its attorney.

And thereupon the jury having been duly selected, empanelled and sworn to try the same, the plaintiff and the defendant to sustain the issues herein on their respective parts, introduced the following oral and documentary evidence, interposed the objections and took the exceptions hereafter noted, to-wit:

Mr. WATERMAN: Plaintiff offers in evidence the original instrument copy of which is set out in the first cause of action, marked Exhibit A, which said Exhibit A is in words and figures as follows:

PLAINTIFF'S EX. A.

Certificate of Indebtedness.

$11,250.00. No. 1.

City and County of Denver, State of Colorado.

The Federal Ballot Machine Company having presented its claim, for furnishing ballot machines, against the City and County of Denver, in the sum of Eleven Thousand Two Hundred and Fifty Dollars, and the same having been allowed at a regular meeting of the Board of County Commissioners of the City and County of Denver, State of Colorado, on the seventeenth day of February, 1908, and the Board of County Commissioners, being authorized thereto by the laws of the State of Colorado, Act of 1905, hereby issues its Certificate of Indebtedness for the said sum, and will in one (1) year pay to the order of the Federal Ballot Machine Company the
26 sum of Eleven Thousand Two Hundred and Fifty Dollars, with interest on this sum, from the date hereof, at the rate of

five per cent. per annum; the said interest payable semi-annually, as per two (2) coupons, hereto attached. Interest and principal payable at the office of the County Treasurer of the City and County of Denver, Colorado. This Certificate is one of a series of ten issued in like sum, payable annually.

Signed by the Board of County Commissioners of the City and County of Denver, of the State of Colorado, by its Chairman, and attested by the County Clerk and Recorder with the seal of the County, authorized thereto by resolution of the 20th day of February, 1908.

Denver, Colorado, February 20th, 1908.

BOARD OF COUNTY COMMISSIONERS OF
THE CITY AND COUNTY OF DENVER,
By S. D. C. HAYS, *Chairman.*

[Seal of the City and County of Denver.]

Attest:
ALBION K. VICKERY,
County Clerk and Recorder of the City and County of Denver, Colorado.

Written across the face thereof is the following: "Protested Feb'y 23, 1909, for non-payment. Geo. O. Dostal, Notary Public."

Endorsed on the back as follows: No. 1. $11,250.00. City and County of Denver, Colorado, to Federal Ballot Machine Co. Certificate of Indebtedness due February 20th, 19—. Semi-annual interest coupons, $281.25, payable 20th of August and February. Pay to the order of The Home Savings Bank, Detroit, Mich. Federal Ballot Mach. Co., A. Andrew, Vice-Pres't.

Which said Exhibit A was admitted in evidence.

Mr. WATERMAN: Plaintiff also offers in evidence the original instrument set out in the second cause of action contained in the complaint, marked Plaintiff's Exhibit D, which said Exhibit D is in words and figures as follows:

PL'FF'S EX. D.

$281.25.

On the 20th day of February, 1909, the Board of County Commissioners of the City and County of Denver, State of Colorado, will pay to the order of The Federal Ballot Machine Company, at the office of the County Treasurer of the City and County of Denver,
27 Colorado, two hundred eighty-one and one quarter dollars, being six months' interest to that date on Certificate of Indebtedness No. 1 for $11,250.00.

BOARD OF COUNTY COMMISSIONERS OF
THE CITY AND COUNTY OF DENVER,
COLORADO,
By S. D. C. HAYS, *Chairman.*

Attest:
ALBION K. VICKERY,
County Clerk and Recorder of the City and County of Denver, Colorado.

Written across the face thereof is the following: "Protested Feb'y 23, 1909, for non-payment. Geo. O. Dostal, Notary Public."

Endorsed on back as follows: Federal Ballot Mch. Co. A. Andrew, Vice-Pres't.

Which said Exhibit D was admitted in evidence.

Mr. WATERMAN: I now desire to move that the depositions taken in this case may be opened and read.

The COURT: They may be opened.

The deposition of CHARLES HOWELLS COFFIN, taken before E. Bentley Hamilton, a Notary Public within and for the County of Cook in the State of Illinois, in the City of Chicago, Illinois, on the 15th day of February, A. D. 1910, on behalf of the plaintiff the witness being first duly sworn testified as follows:

Direct examination.

By Mr. ZANE:

Q. Will you state your full name, please?
A. Charles Howells Coffin.
Q. Where do you reside, Mr. Coffin?
A. In the City of Chicago, Illinois.
Q. How long have you resided here, approximately?
A. Approximately since 1884.
Q. And you have been engaged in business here?
A. Yes, sir.
Q. Are you acquainted with the corporation, H. T. Holtz & Company?
A. Yes, sir, I am secretary of that corporation.
Q. How long have you been secretary of H. T. Holtz & Company?
A. Approximately nine months.
Q. That is an Illinois corporation, is it?
A. No sir, it is a corporation organized under the laws of the state of Maine.
Q. What is its business?
A. Dealing in municipal, railroad and corporate bonds.
28 Q. And selling bonds on the market?
A. Yes sir.
Q. And you are, as secretary of H. T. Holtz & Company, in charge of its books and papers?
A. Yes, sir.
Q. I draw your attention to a paper which is called "Certificate of Indebtedness, numbered 1," City and County of Denver, State of Colorado, for $11,250, which I will ask the reporter to mark as Plaintiff's Exhibit A. with his initials——

The document was marked, as requested, with the initials "G. G. T."

Q. (Continuing:) —and which now has been marked "Plaintiff's Exhibit A," with the reporter's initials, "G. G. T.," and ask

when you first saw that certificate or any of the series of which that certificate is one (handing same to witness)?

A. In the latter part of March or the early part of April, 1908. I cannot give you the exact date.

Q. That certificate is numbered 1. Were there other certificates in that series?

A. Yes sir, there were ten certificates in all, for a like amount.

Q. For the same amount?

A. Yes, sir.

Q. And all dated the same date?

A. All dated the same day.

Q. What connection did H. T. Holtz & Co. have with these certificates?

A. We were asked to sell these certificates by the Federal Ballot Machine Company.

Q. In pursuance of that request did H. T. Holtz & Company make any effort to sell these certificates?

A. Yes sir, as a matter of fact we did sell all of those certificates.

Q. During the course of that sale did you advertise the certificates anywhere?

A. No sir, not by means of a published advertisement. There were a good many letters, I believe, written to various people about them.

Q. Drawing your attention to these certificates,——

A. Yes sir.

Q. —prior to the sale, and prior to entering upon efforts to effect a sale of them did you submit them to an attorney?

A. Yes sir.

Q. For his opinion upon the certificates?

A. Yes sir.

Q. You always do that in the case of your securities?

A. We always do that. It is a regular matter with us to do that.

29 Q. When the certificates were submitted to you were they accompanied by the opinion of any attorney?

A. Yes sir, they were accompanied by the approving legal opinion of Mr. H. P. Bennett, if I have the initials correctly.

Q. Of the First National Bank of Denver?

A. Of the First National Bank of Denver, Colorado.

Q. I show you a paper which I will ask the reporter to mark Plaintiff's Exhibit B, with his initials,——

The document was marked as requested.

Q. —which has now been so marked, and asked you if that is the opinion which was submitted to you by the Federal Ballot Machine Company on the legality of the certificate? (Handing same to witness.)

A. Yes, sir.

Q. To what attorney or attorneys did you submit the certificates on your part?

A. To Mr. Weber of the firm of Shope, Zane, Busby & Weber of Chicago, Illinois.

Q. And they were submitted on the record of the proceedings had?

A. Yes sir.
Q. And upon that record did you receive an opinion?
A. Yes sir.
Q. I show you a paper which I will have the report- mark Plaintiff's Exhibit C, with his initials——

The paper referred to was marked as requested.

Q. (Continuing:) —which has now been marked "Plaintiff's Exhibit C," and I will ask you if that is the opinion which you received? (Handing same to witness.)
A. Yes sir.
Q. Now, drawing your particular attention to the certificates of this series, numbered 1, which has been marked "Plaintiff's Exhibit A," I will ask you if you know through whom that certificate was sold?
A. This certificate was sold by Mr. Fontaine Le Maistre, and through the firm of Karl R. Davies & Company, brokers, in Detroit, Michigan, to the Home Savings Bank of Detroit, Michigan.

Mr. BROCK:

Q. This certificate you say was sold through whom?
A. By Mr. Fontaine Le Maistre, who was a salesman representing our house.
Q. You say he was your agent at Detroit?
A. He traveled from our Chicago office, yes sir, and he negotiated this sale in Detroit.

30 Mr. ZANE:

Q. In the course of business in regard to the sale of this certificate, Plaintiff's Exhibit A, did you receive any money for the certificate from any one?
A. Yes sir. We were paid for the certificate at the full purchase price by the Home Savings Bank of Detroit.
Q. What was the purchase price?
A. It was a little over 99 and interest. I should have brought the exact figures, but I did not think of it.

Mr. ZANE: We have the exact figures.

Q. You mean 99 cents on the dollar?
A. Yes sir.
Q. And interest?
A. And accured interest to the date of delivery.
Q. At that time the certificate had coupons upon it, had it?
A. Yes sir.
Q. How many?
A. Two.
Q. I show you a paper which I will have marked Plaintiff's Exhibit D——

The paper was marked accordingly.

Q. (Continuing:) —and which has now been marked "Plaintiff's Exhibit D," and I will ask you if that is the second coupon which was on the certificate? (Handing same to the witness.)

A. Yes, sir.

Q. When the certificate, Plaintiff's Exhibit A, was delivered to H. T. Holtz & Co. did it have any endorsement on it?

A. Yes sir, it bore the endorsement of the Federal Ballot Machine Company, by Adam Andrew, Vice-President.

Q. I draw your attention to the endorsement on the back of this certificate, where it says, "Pay to the order of the Home Savings Bank, Detroit, Michigan. Federal Ballot Machine Co. A. Andrew. Vice-president." The endorsement was in blank when it was delivered to you, was it?

A. Yes sir.

Q. And who wrote the endorsee's name?

A. That I don't know.

Q. That you do not know?

A. No sir. When we delivered the certificate to the Home Savings Bank it was endorsed in blank.

Q. A general endorsement?

A. Yes sir.

Q. All of the coupons were endorsed in the same way?

A. Yes sir.

Q. By a general endorsement?

A. Yes sir.

Q. Mr. A. Andrew was the vice-president of the Federal Ballot Machine Company?

Mr. BROCK: I object at this point, on the ground that the last two or three questions are incompetent, and do not constitute the proper method of proving agency.

31 A. Yes sir.

Mr. ZANE:

Q. Did you receive from the Federal Ballot Machine Company any copy of the minutes of a meeting or meetings of the Board of Directors, showing the authority of Mr. Andrews to endorse?

A. Yes sir, we received such a certificate.

Q. I will draw your attention to a paper which I will ask the reporter to mark "Plaintiff's Exhibit E,"——

The paper was marked, as requested, with the initials "G. G. T."

Q. (Continuing:) —and ask you if this is the paper, so marked Plaintiff's Exhibit E,—if this paper is the certified copy of the resolution which was submitted to you? (Handing same to witness.)

A. Yes sir.

Q. In addition to that certified copy of a resolution of the Board of Directors, did you see any other statement of authority from the officers of the Federal Ballot Machine Company, as to the authority of Mr. Andrew, the vice-president, to endorse and dispose of these certificates?

A. Yes sir. We also had a certificate signed by the secretary of the company and the president, stating that Mr. Adam Andrew was authorized to endorse these certificates.

Mr. BROCK: The defendant objects and moves to strike out the statement as to what the paper mentioned by the witness is, and objects to any testimony with respect to said paper, on the ground that it is immaterial, but does not interpose an objection on the ground that the paper is a copy, and not the original.

Mr. ZANE: I will ask the reporter to mark this paper which I hand him, Plaintiff's Exhibit F.

The paper is marked as requested.

Q. Referring to this paper which has been marked Plaintiff's Exhibit F, I hand you that paper and ask if that was the paper submitted to you, also showing the authority of Mr. Andrew? (Handing same to witness.)

A. Yes, sir.

Q. Were these opinions of counsel and the papers showing the authority of Mr. Andrew to endorse, submitted to the Home Savings Bank before its purchase?

A. Yes sir.

Q. Did you pay the Federal Ballot Machine Company for this particular certificate, Plaintiff's Exhibit A, separately from payment for the other certificates in the series?

A. Yes sir.

Q. Have you the check?

The witness produces the check and handed it to counsel.

32 A. Yes sir.

Q. This check which you have produced is produced from the records of H. T. Holtz & Company?

A. Yes, sir.

Q. It is one of its cancelled checks?

A. Yes, sir.

Q. Returned to H. T. Holtz & Company from its bank?

A. Yes sir.

Mr. ZANE: I will ask that the reporter mark this check Plaintiff's Exhibit G,——

The check was marked as requested.

Q. This is the check that paid for the certificate, Plaintiff's Exhibit A?

A. Yes sir.

Q. And for that certificate you were paid by the Home Savings Bank in Detroit?

A. We were paid by the Home Savings Bank in Detroit, yes sir.

Q. That check was delivered on its date, June 22, 1908?

A. Yes sir.

Q. And paid through the Chicago Clearing House June 24, 1908?

A. Yes sir.

Q. The Federal Ballot Machine Company has an account at the Continental Bank of Chicago?

A. I so understand, yes sir. The certificates were deposited there by the Federal Ballot Machine Company so that we could get them when we sold them.

Cross-examination.

By Mr. BROCK:

Q. You say you have been secretary of H. T. Holtz & Company for about nine months?

A. Approximately, yes sir.

Q. You were not secretary at the time of the transaction to which you have referred?

A. No sir, I was manager of the municipal bond department.

Q. In your efforts to sell this certificate to which you have referred in your direct examination, I believe you said you made no advertisement at all?

A. No sir. I might add that that is not usual in such cases.

Q. Where was the deal closed between Holtz & Company and the Home Savings Bank? At Detroit or in Chicago?

A. The transaction was closed in Detroit.

Q. You were not in Detroit at all?

A. I was not in Detroit.

Q. You then, of course, know nothing personally as to what may have taken place between the officers of that bank and Holtz & Company's agent, Mr. Le Maistre?

33 A. No sir, except as confirmed by subsequent events.

Q. Where is Mr. Le Maistre now?

A. Right here sir, in this room. (Indicating Mr. Le Maistre sitting beside him.)

Q. You say the certificate mentioned was endorsed in blank when you received it?

A. Yes sir.

Q. And you delivered it to the plaintiff in that condition?

A. Yes sir.

Q. Who delivered it to the plaintiff, do you know?

A. It was delivered in the usual course of business, sir, through our bank sending it down to a bank in Detroit for collection. My recollection is that it was the Central Trust Company of Illinois, through whom we delivered it, but I cannot answer for certain on that.

Q. You stated that certain legal opinions to which you made reference in your direct examination, were submitted to the Home Savings Bank before the purchases were made. Do you speak of that of your own knowledge, or is that hearsay?

A. Well sir, I, myself, delivered the papers to our agent for delivery to the Home Savings Bank, and the fact——

Q. You base your statement then on the assumption that he dealt with those papers as you instructed him?

A. Yes, and subsequently confirmed by information which I received from the Home Savings Bank.

Q. You know nothing personally apart from the fact that you gave them to Mr. Le Maistre?

A. To my absolute knowledge, that is all, sir.

Q. In order that I may understand the situation precisely; your company, Holtz & Company, received a commission for selling these certificates, I assume?

A. We were to get what profit we could get above a certain stipulated price, which certificates were to net the Federal Ballot Machine Company.

Q. How much were they to net the Federal Ballot Machine Company?

A. This particular certificate was to net the Federal Ballot Machine Company 97 and interest.

Q. You mean 97 cents on the dollar?

A. I mean 97 cents of the dollar.

Q. And accrued interest?

A. And accrued interest.

Q. Your profit consisted in the difference between 97 cents on the dollar and 99 cents or a little over, at which they were sold, is that it?

A. And the purchase price paid by the Home Savings Bank, yes sir, 99 cents or a little over.

34 Q. You were not present when the deal was closed with the Home Savings Bank?

A. No, sir.

The deposition of FONTAINE LE MAISTRE, taken before E. Bentley Hamilton, a Notary Public within and for the County of Cook in the State of Illinois, in the City of Chicago, Illinois, on the 15th day of February, A. D. 1910, on behalf of the plaintiff, the witness being first duly sworn testified as follows:

Direct examination.

By Mr. ZANE:

Q. State your full name, please?

A. Fontaine Le Maistre.

Q. Where do you reside?

A. Chicago, Illinois.

Q. Are you the Mr. Le Maistre who was spoken of as the selling agent of George T. Holtz & Company?

A. Yes, sir.

Q. And you were such in the year 1908?

A. Yes sir.

Q. I draw your attention to Plaintiff's Exhibit A, being a certain certificate of indebtedness numbered 1, of the City and County of Denver, State of Colorado, for $11,250, and ask you if you negotiated the sale of that security? (Handing same to witness).

A. Yes, sir.

Q. At the time you negotiated the sale how many coupons did it have attached?

A. I did not see the certificate, and therefore I could not say.

Q. In your negotiation, to whom did you present the certificate for sale? With whom did you have negotiations?

A. I had just the statement of the certificate. I did not have the certificate itself, but it was merely the statement of the certificate which I offered to several people among whom was Karl R. Davies & Company of Detroit, Michigan. Karl R. Davies & Company made the actual sale to the Home Savings Bank.

Q. What kind of a house are they? In what line of business are they?

A. They are in the business of investment securities.

Mr. BROCK:

Q. This was through whom?

A. Karl R. Davies.

Q. The negotiations then were through Karl R. Davies?

A. Yes. That is, the direct negotiations with the Home Savings Bank.

Mr. ZANE:

Q. What was the price at which that certificate was sold?

A. It was sold on a 6 per cent basis. I don't know the exact figures. It was on a 6 per cent basis; that is, it was to net the Home Savings Bank 6 per cent.

35 Q. That is, the Home Savings Bank was to pay such a price for that that it would net them the principal and six per cent interest?

A. That is it.

Q. When did you first become aware of the fact that the sale had been made to the Home Savings Bank?

A. About three weeks before the actual payment by the Home Savings Bank.

Q. Did you see any of the officers of the Home Savings Bank in connection with the matter?

A. No.

Q. You did not deliver the certificate yourself?

A. No sir.

Q. Did you deliver any paper to the Home Savings Bank such as the opinions of counsel and a certified copy of certain resolutions, and a paper from the President and Secretary of the Federal Ballot Machine Company, showing the authority of Mr. Andrew, the Vice-president, to endorse the paper?

A. No. I had no negotiations whatever with the Home Savings Bank. But——

Q. Did you deliver those papers to anybody?

A. Not personally, no. I asked the office to ship them to Karl R. Davies & Company, who delivered them to the attorney for the Home Savings Bank for his opinion——

Mr. BROCK:

Q. Are you stating that as a fact, or merely as your instructions? I do not understand which.

A. Those were merely my written instructions to the House. I was in Michigan at the time and I requested them to ship the papers to Karl R. Davies & Company.

Mr. ZANE:

Q. As to the payment made by the Home Savings Bank to H. T. Holtz & Company you have no personal knowledge, have you?

A. None whatever, except hearsay.

Q. And all you did was with the brokerage firm of Karl R. Davies & Company to negotiate a sale of this certificate to the Home Savings Bank?
A. Yes sir.
Q. What time was that?
A. Well, I cannot be definite, but it was in the spring of 1908.

Cross-examination.

By Mr. BROCK:

Q. Then you had no negotiations at all with any of the officers of the plaintiff, the Home Savings Bank?
A. None whatever.
Q. Then you have no personal knowledge as to what transpired in closing the deal with that bank?
A. None whatever.
Q. You do not know personally when the sale was effected?
36 A. Not the exact date.
Q. You heard of it within——
A. I heard of it, not through our House, but while I was in Michigan I heard that the delivery had been made.
Q. Did you hear of this before or after the delivery?
A. After the delivery.
Q. After the delivery, about three weeks afterward?
A. If I remember correctly, it was about three weeks after the offer was presented to the Home Savings Bank before they actually paid for it. That is just my remembrance.
Q. The whole matter was closed by Messrs. Davies & Company?
A. Yes sir.
Q. Acting as——
A. Acting as our agent.
Q. As your agent?
A. Yes sir.
Q. What particular individual carried on that transaction, or do you know?
A. Karl R. Davies himself.
Q. Where is he now?
A. I believe he is in Detroit.

The deposition of OLE CHRISTIAN OLSEN, taken before E. Bentley Hamilton, a Notary Public within and for the County of Cook in the State of Illinois, in the City of Chicago, Illinois, on the 15th day of February, A. D. 1910, on behalf of the plaintiff; the witness being first duly sworn testified as follows:

Direct examination.

By Mr. ZANE:

Q. Please state your name?
A. Ole Christian Olsen.
Q. Where do you reside, Mr. Olsen?
A. Minneapolis.

Q. Have you ever had any business in connection with the Federal Ballot Machine Company?

A. Yes. I was the office manager of the company at Minneapolis.

Q. When?

A. In 1905, 1906 and part of 1907.

Q. Do you know Mr. Adam Andrew, the Vice-president of the Federal Ballot Machine Company?

A. Yes.

Mr. BROCK: Let me get his statement as to when he was office manager.

The WITNESS: I was office manager during 1905, 1906 and a part of 1907. And I was Assistant Manager, in charge of the factory end, until the factory was moved out to Jamestown last February.

Mr. ZANE:

Q. Are you now in the employ of the Federal Ballot Machine Company?

A. No sir.

Q. Are you also acquainted with Mr. George W. Reed, the Secretary of the Federal Ballot Machine Company?

37 A. Yes, I am.

Q. Do you know the signature of Mr. Adam Andrew?

A. Yes sir.

Q. You became acquainted with his signature how?

A. By seeing him personally sign his name, and also by seeing it on numerous letters, stock certificates and other instruments.

Q. I draw your attention now to Plaintiff's Exhibit A and ask you if you recognize under the words "Federal Ballot Machine Co." the signature that is put upon the paper there (Handing the document in question to the witness)?

Mr. BROCK:

Q. Did your statement as to knowing the signature go to both of these gentlemen or only to Mr. Andrew?

Mr. ZANE: I asked him about Mr. Andrew first.

The WITNESS:

A. This is Mr. Andrew's signature.

Q. You know that that is his signature?

A. I know that that is his signature.

Q. I draw your attention to the endorsement on the coupon, which is Plaintiff's Exhibit D, and ask you if that is also his signature? (Handing same to the witness).

A. Yes sir, that is Mr. Andrew's signature.

Q. How did you become acquainted with the signature of George W. Reed, the Secretary of the Federal Ballot Machine Company?

A. I saw it on stock certificates, and numerous letters and other documents.

Q. You have also seen him write?

A. Yes. Well no, I have not seen him sign his name.

Q. But in the office there where you were engaged, his signature often passed under your notice?
A. Yes, quite often.
Q. On documents?
A. Yes, on documents, and to letters, etc.
Q. I draw your attention now to the signature of George W. Reed on Plaintiff's Exhibit E, and ask you if that is his signature? (Handing same to witness).

Mr. BROCK:

Q. You say you never saw Mr. Reed write his name?
A. Well, I cannot say that I have seen him write his name except I have seen him write.
Q. You have seen him write but you have never seen him write his name, so far as you recollect?
A. I believe—he must have signed it when I saw it, although I cannot say just when, but I know his signature thoroughly.

38 Mr. ZANE:

Q. Is that his signature on Plaintiff's Exhibit E.
A. That is his signature.

No Cross-examination.

The deposition of JULIUS H. HAASS taken before E. Bentley Hamilton, a Notary Public within and for the County of Cook in the State of Illinois, in the City of Chicago, Illinois, on the 15th day of February, A. D. 1910, on behalf of the plaintiff; the witness being first duly sworn testified as follows:

Direct examination.

By Mr. ZANE:

Q. Please state your name?
A. Julius H. Haass.
Q. Where do you reside?
A. In the City of Detroit, Michigan.
Q. How long have you resided there?
A. Almost 41 years. That has been my residence all my life.
Q. Have you any official connection with the Home Savings Bank at Detroit?
A. I am president of the Home Savings Bank at that city.
Q. How long have you been president of that bank?
A. Since last February, I have been president.
Q. You have been president since February, 1909?
A. Yes sir.
Q. Prior to that time what was your position?
A. I was cashier prior to that time.
Q. The cashier of the Home Savings Bank?
A. Of the Home Savings Bank.
Q. At any time while you were cashier was a certificate of indebtedness of the City and County of Denver, which has been marked Plaintiff's Exhibit A, brought to your attention as a security?

A. Yes sir. This is the certificate (Indicating same). Shall I answer fully in this statement?

Q. Yes.

A. (Continuing) —and was bought by the Home Savings Bank through me on June 19, 1908, with this check (referring to the check), from the First National Bank of Detroit, to whom it was sent by H. T. Holtz & Company of this city, with this letter (Indicating same).

Mr. BROCK:

Q. June 19, 1908?

A. June 19, 1908. That check is so dated. It was placed on our books June 20, 1908. Here is a copy of our discount register.

39 Mr. ZANE:

Q. With whom did you have your negotiations for the purchase of this certificate?

A. I had negotiations with two Detroit brokers. One was Karl R. Davies and the other one was Ehrman, his first name I have forgotten for the moment.

Q. They purporting to represent Holtz & Company?

A. To represent Holtz & Company, yes sir. They were agents for Holtz & Company in this transaction.

Mr. BROCK:

Q. What was the name of that second man?

A. Now I recall. Adolph Ehrmann. Adolph is his first name; he brought this to my attention, and he represented Karl R. Davies.

Q. At the time you purchased the certificate did it have any coupons on it?

A. Yes, sir.

Q. How many?

A. I don't recall that, but I think it had two or possibly more.

Q. It did have, as a matter of fact, two?

A. I believe two. I am not clear on that though, Mr. Zane. There were coupons attached, yes sir. There were coupons attached.

Q. It drew interest semi-annually?

A. Semi-annually. It was——

Q. It recites that it was two coupons attached?

A. Yes.

Q. So it should have had two coupons?

A. Yes sir.

Q. You notice that the certificate itself recites that it has two coupons attached?

The WITNESS (After examining the certificate): Yes.

Q. One of these coupons is the coupon which has been marked Plaintiff's Exhibit D?

A. Yes sir.

Q. Now, at the time that you received the certificate, it was endorsed in blank by the Federal Ballot Machine Company?

A. Yes sir.

Q. By the way, this endorsement that is written above the blank

endorsement by the Federal Ballot Machine Company, that is "Pay to the order of the Home Savings Bank," who wrote that?

A. That is written by myself, sir.

Q. Your handwriting?

A. My handwriting. And this other endorsement we had verified. We had it verified.

Q. How did you have it verified?

A. I say that by correspondence we had it verified, to see that it was authorized and endorsed. Here is some of the correspondence (producing and handing to Mr. Zane several letters), showing that this man was authorized to endorse for the company.

40 Q. You had submitted to you a certified copy of a resolution of the Board of Directors authorizing Mr. Adam Andrew to sell and so on?

A. You see that is signed by Mr. Henkle, of the Illinois Trust & Savings Bank.

Q. The other one is it. Do you remember, after having seen this one, of which you retained a copy?

A. Yes. We sent the original papers to our attorneys to examine them, and they made a report on them and kept this copy. Whether that is an original I am not sure, but it was a paper similar to that,——

Q. It was either Plaintiff's Exhibit E or another original?

A. Or another original.

Q. And you retained a copy?

A. We retained a copy, yes.

Q. You also had submitted to you a copy which has been marked Plaintiff's Exhibit F, of which you retained a copy?

A. Yes sir, a paper similar to this, or that one (indicating).

Q. Do you remember that you also had submitted to you any opinions of attorneys?

A. Yes sir, we had the opinion of this legal firm and others. I have a copy of them here. Would you like to see it?

Mr. ZANE: We have introduced the original in evidence.

The WITNESS: All right, sir. There is a copy of your opinion (Handing same to Mr. Zane).

Q. Who were the others?

A. Of our own attorney, and then there was,—I don't know very much about this one. We depended somewhat upon Mr. Zane's opinion, somewhat more upon his opinion because some of our directors are acquainted with him and one of our directors especially knows Mr. Zane very favorably, and we relied on that information.

Q. In paying for the certificate you paid through the First National Bank of Detroit, Michigan?

A. Yes sir. Let me see; the certificate laid there, I should say, a week or more because we wished to verify the endorsement and while our attorney looked over the papers. You will see the memoranda which the First National made, attached to their letter, saying that they wanted to verify the signature or the endorsement or something like that, because it was unknown to us, and the First National held it in the meantime.

Q. Now, the check which you issued for that certificate is the check which you have produced?

A. Yes, sir.

Mr. ZANE: I will ask the reporter to *make* the check which has been produced by the witness as Plaintiff's Exhibit H, with
41 his initials. The check referred to was marked as requested.

Mr. ZANE:

Q. To whom did you deliver this cashier's check?

A. To the First National Bank. You will see their endorsement on the back, through the Clearing House. The First National Bank of Detroit.

Q. You have also the letters transferring that certificate of indebtedness to the First National Bank of Detroit, which you have produced?

A. Which they loaned to me yesterday for this purpose. That belongs to the First National Bank of Detroit. I asked for this letter, which they loaned to me for the purpose of showing this transaction and what connection they had with it.

Mr. ZANE: I will ask the reporter to mark this letter which has been produced as Plaintiff's Exhibit I.

The letter referred to was marked as requested.

Q. That is the signature of H. T. Holtz & Company?

A. Let me look it over carefully. (The witness examined the signature carefully). Here is one (producing it). Yes, I should say that is. It is exactly the same signature.

Q. The certificate when it was sent over was accompanied by a bill, was it?

A. Yes sir.

Q. And that bill you have produced?

A. That bill we had in our files; it was put in the files in the usual way, when we buy any bonds we put the bill in the files until it is paid, and then it is put in these files that way.

Mr. ZANE (addressing the reporter): Please mark this receipted bill Plaintiff's Exhibit J.

The bill was marked as requested.

Mr. ZANE:

Q. So this certificate with the coupons was bought by the Home Savings Bank, just as any other municipal security, in the due course of business?

A. After a careful investigation, in due course of business, the certificate was bought in good faith by the Home Savings Bank as an investment.

Q. And as an outright purchase?

A. As an outright purchase.

Mr. BROCK: I object to the preceding question of counsel and to the answer, and I move that the answer be stricken out on the ground that it is the statement of a conclusion.

42 Mr. ZANE:

Q. The first coupon on Plaintiff's Exhibit A was paid, was it not?

A. I was just thinking about that. To the best of my knowledge it was. I didn't look up that point, but I believe it was paid. In fact I know we have not got it, so I know it must have been paid. Yes, I know it was paid. It was paid, although I did not look at that point particularly, but I know it was paid:

Cross-examination.

By Mr. BROCK:

Q. Mr. Haass, you were the only person who had any negotiations about the purchase of this certificate on the part of the Home Savings Bank?

A. I was.

Q. You did all the business?

A. I did all the business, and I conferred with our loaning committee, but I did all the business of purchasing this certificate, yes sir.

Mr. KANE:

Q. Did you have any knowledge or was there any intimation made to you by anyone that the certificate had not been issued in good faith, that they were not valid securities of the City and County of Denver?

A. No sir, on the contrary I had the information of our attorney that they were absolutely valid, and that the City of Denver was obligated to pay this certificate. Our attorney is a man who investigates a lot of Michigan farms. In fact he is probably the best authority there is in Detroit. The national banks use him whenever they buy bonds. And he told me, and he tells me to-day that——

Mr. BROCK: I object to any statement made by counsel.

The WITNESS: All right, sir.

Mr. ZANE:

Q. Did you receive any notice or any intimation or did you have any knowledge of any kind whatever that there was any claim made that these certificates had been improperly secured from the City and County of Denver?

A. Under no circumstances. Had we had, we would not have touched them for a minute. We thought they were absolutely good.

Mr. BROCK:

Q. Do you know anything about what is called the Federal Ballot Machine?

A. No sir, and I don't care anything about it.

Q. That is a voting machine for which these certificates had been issued?

43 A. I did not at the time know anything about it, but I have since because that same subject has come up in Detroit

within the last few weeks. But I did not at that time know anything about the Ballot Machine, nor did I care. I knew about Denver because I had been there. I knew that Denver was a good city.

Q. You knew these certificates had been issued for the payment of these voting machines, did you not?

A. Yes, that they were in payment for these voting machines, but I knew it was the debt of the City of Denver, Colorado, and that was all we cared about.

Q. You say the entire negotiation, so far as the Home Savings Bank was concerned, in acquiring this certificate, was carried on through you?

A. Yes.

Q. And by no one else?

A. The entire negotiation was carried on through me and no one else.

Q. The first person who talked to you about it was Mr. Ehrmann?

A. Yes, I should say he was.

Q. And you say he was a representative of Mr. Davies?

A. He was in some way connected with Mr. Davies. Mr. Ehrmann——

Q. The deal was not closed with Mr. Ehrmann, but with Mr. Davies?

A. After some correspondence with the owners of the certificates—Holtz & Company—I think the deal closed through Holtz & Company because they simply presented the matter, and we dealt through Holtz & Company and through the First National Bank of Detroit. We did not pay Davies or Ehrmann.

Q. Did you agree on the price to be paid? [*A.*] Was it with Mr. Davies?

A. Yes; Mr. Davies and Mr. Ehrmann.

Q. Were they both present?

A. Mr. Davies—I don't know. I know that the final arrangement was made with Mr. Davies.

Q. What did you agree to pay for the certificate?

A. The price stated in that bill there (indicating same).

Q. You mean in Exhibit J?

A. Yes.

Q. $11,355.63?

A. Yes sir, and that included interest and all. I might amend by saying—I don't know whether I shall say anything without being directly questioned?

Mr. ZANE: Go right along.

The WITNESS (continuing): You know, at that time the banks were not buying very many bonds. It was immediately after
44 the panic, and the banks were not loaning out much money or buying bonds to any great extent. The rates were higher, and we could get better rates, and we were buying securities at as good advantage as we could get at that time; while to-day that would be a somewhat higher rate to me, yet back in the panic time or shortly after it it was not. We were buying some bonds right through the last panic, and therefore it was a little higher rate than

we could get to-day, but not high for them when you consider what the United States Steel Corporation bought the bonds of the Tennessee Coal and Iron Company for.

Q. Mr. Haass, did you have any agreement of any sort by which under any circumstances this certificate should be taken back either by Holtz & Company or the Federal Ballot Machine company?

A. No sir, under no circumstances. I had no agreement whatever that Holtz or the Federal Ballot Machine Company should take them back, only as the Federal Ballot Machine Company is an endorser on the note and the note was protested.

Q. You did not require any endorsement by Holtz & Company?

A. No sir, they are not obligated. The only thing which I should think would require Holtz & Company to pay would be a forgery or fraud in selling them to us.

Q. Holtz & Company were not called upon by you to endorse the certificate?

A. No sir, we have never bought a bond or a certificate of a bond or brokerage house that——

Q. I don't care to put in here anything about any other case. You are getting a good deal more into the record than I care for.

The WITNESS: All right, sir. Excuse me.

Q. You purchased this certificate, endorsed by the Federal Ballot Machine Company in blank?

A. Yes sir.

Q. And without any other endorsement?

A. Without any other recourse.

Q. Did you have any other security of any sort?

A. No other security or agreement than as stated in that bond.

Q. Did you have any understanding either with the Federal Ballot Machine Company or with Holtz & Company, as to who would bear the expense in the event that it would be necessary to prosecute an action at law or otherwise to recover on those certificates?

A. No sir. And that was not thought of by me or by our bank.

45 Q. You have no agreement of that sort now? None has been added to it?

A. What is that? That is, that they are to pay the expense of this?

Q. That anyone is?

A. The agreement is that if there are any unusual expenses we are to bear our share.

Q. What is your share, Mr. Haass?

A. I don't know.

Q. With whom have you made that sort of an agreement? With the Federal Ballot Machine Company?

A. No sir. We have never had any talk, nor have I had any talk with the Federal Ballot Machine Company, and I don't know them.

Q. With the Federal Ballot Machine Company?

A. When this was protested Holtz & Company said "We will try to get your money as brokers, but if there is any unusual expense

to the thing, you will have to stand your share of it," to which we agreed.

Q. That was the agreement with Holtz & Company?

A. That is what they wrote us. There is no real agreement about it.

Mr. ZANE:

Q. That was after it was protested?

A. That was after it was protested. After the note was refused payment on in Denver.

Mr. BROCK:

Q. After it had been protested do you remember what particular individual wrote this letter for Holtz & Company?

A. I think Mr. Coffin. I think I am calling that word rightly.

Q. Do you know what was meant by that agreement in which it was stated that you should bear your part of the expense?

A. Well, I believed they thought that Denver, on account of the political situation, would just make a grand-stand play and then drop down and show that they had not a leg to stand on, and that there would be nothing to it. That is what they thought, and that is what we thought. But the thing has been protracted and has run along, but to our surprise.

Q. I am trying to get at the meaning of your agreement to bear your own part of the expense.

A. Well, that is my meaning, that these new people in political power thought that they would make a sort of grand-stand play, and hold that up to show what great people they were. We thought that then, by putting on a little pressure they would pay. But they have not done so as yet.

46 Q. Still I get no information at all from that statement about the grand-stand play, as to what expenses you mean. I know no more about it now than I did before you answered the question.

The WITNESS:

A. I will tell you plainly. We do not know to-day how much expense we will have to pay, and we do not know how long this thing will be protracted. I do not think that you or Mr. Zane knows how much expense it will be if it is fought out for another year.

Q. Without giving dollars and cents, can you tell me what expense you had in mind to bear your part of? What character of expense did you have in mind?

A. Well, what character of expense did we have in mind?

Q. Yes.

Q. We have in mind to-day that we are not obligated thus far for any expense.

Q. But you told me that you——

A. Well, I don't know; unless there was some unusual legal expense.

Q. What did you mean by "unusual expense?"

A. Now, of course, you are getting into the law part of it. That is a part that I am not so familiar with. As I said, we did not think there would be much to the thing at all. We thought it would be paid after a good firm demand had been made.

Q. But you agreed with Holtz & Company that you would bear your part of the expense?

A. We did not make any agreement. That was a letter that they wrote us.

Q. Do you think they just happened to write such a letter? What did they do it for?

A. I will tell you why. It is very often the custom of a bond house, when they sell a security to see it through. They want to keep their reputation intact.

Q. That is what I wanted to understand. Did Holtz' Company agree with you when you purchased——

A. No sir.

Q. (Continuing:) That they would see it through?

A. I told you they did not. Neither does any bond house; but a bond house must keep its skirts clear. They don't want to sell securities and have them fall down. Some bond houses advertise the fact that they never have sold a security that has fallen down.

Q. You had no agreement with Holtz & Company in the first instance at all, did you?

A. None whatever that they were to——

47 Q. Nevertheless, when the certificate was protested they did say to you——

A. They said that they regretted it very much and were surprised——

Q. (Continuing:) —but that you would have to bear your part of the expense. Did you understand from that that they were going to bear any part of the expense themselves?

A. Yes, I understood that, that they were going to bear the first part of the expense.

Q. That they were going to bear the first part of the expense?

The WITNESS: You ask Mr. Coffin about that?

Q. Do you know?

A. No, I don't know absolutely. I think, if they had put in a reasonable bill the claim would have been allowed. We want to do the right thing. It has been an unexpected thing for us and for them, and we are meeting it as fairly as we know how.

Q. After the matter was taken up with you and before the purchase, did you have any negotiations with the Federal Ballot Machine Company itself at all?

A. I never had any negotiations either with the bank or the Ballot Machine Company, either verbal or written.

Q. Did you have any correspondence or negotiations with the Ballot Machine Company either before or after the certificate was protested?

A. Never before or since.

Q. Your entire dealing has been with Holtz & Company?

A. Yes sir.

Q. Either through the office here in Chicago——

A. Yes sir.

Q. (Continuing:) —or through Mr. Davies, their representative in Detroit?

A. Yes sir.

Q. You had nothing to say by correspondence or otherwise, to the Federal Ballot Machine Company as to their liability to you as an endorser of this certificate?

A. Nothing to say to them?

Q. Yes.

A. I never wrote them. They were notified by the Denver National Bank, which received the protest notice, or at least the notary certified so in the certificate. But we never had any dealings with them. I do not even know where their headquarters are.

Q. You recognize that they are liable primarily to you as endorsers of this paper, don't you?

A. I don't think primarily. I think Denver is recognized as primarily liable; and they are second.

48 Q. Then you never regarded the Federal Ballot Machine Company as primarily liable to you at all?

A. The Federal Ballot Machine Company?

Q. Yes.

A. No. I think the City of Denver is primarily liable to us. They are the endorser. Who they are and how strong they are, I don't know anything about that.

Q. Mr. Davies is in Detroit, I believe?

A. Yes, he was yesterday. He came in to see me and get a copy of that exhibit there (indicating), that receipt which Holtz & Company gave me.

Redirect examination.

By Mr. ZANE:

Mr. ZANE: In connection with the deposition of Mr. Haass, we offer in evidence Plaintiff's Exhibit H, Plaintiff's Exhibit I and Plaintiff's Exhibit J, which are original files; and we will substitute in the deposition in their stead, copies, and will ask leave to make their substitution and will agree to procure the originals if there is any question about the originals, which have been marked by the reporter.

CHARLES HOWELL COFFIN, being recalled on behalf of the plaintiff further testified as follows:

Direct examination.

By Mr. ZANE:

Q. Mr. Coffin, at the time this particular certificate and at the time the coupons on all of the certificates for the second semi-annual installment of interest were protested at Denver, what did H. T. Holtz & Company do in regard to the latter, and what was the reason for it? I wish you would explain that?

A. As soon as we were advised of the default we notified all of our clients, that is customers who had purchased these certificates of us, that we would do the best we could to get the matter straightened out. At the same time, I wrote the Federal Ballot Machine Company, notifying them of the default, and made what might be called a formal demand on them for payment. I was not fully advised as to whether it was legally necessary, but I did it simply as a precautionary measure.

We then immediately took up the matter with Mr. Harry Weber of the firm of Shope, Zane, Busby & Weber of Chicago, and we retained him ourselves in the matter to go forward with it and disclose the circumstances, and to find out what was necessary to be done. We told our customers that we would not ask them to bear any part of the preliminary expenses in the matter. At that
49 time all we had in mind was the expense that would be incurred in disclosing the real state of affairs that existed. As a matter of fact, we have never asked any of our clients to bear any of the expense in this matter, and unless the expense grows very heavy we have no immediate intention of doing so.

Q. And [*who*] do you do that? Is it because you feel any responsibility?

A. We did not and we do not feel under any legal responsibility to do that at all, but on the other hand we try to keep up the reputation of our house on the highest level possible. We do not want to sell a security to a customer that will give him trouble. If it gives him trouble we want to use our best endeavor to any reasonable extent to protect him and to make the collection, whenever necessary. It is the policy of our House to do so, as I believe it is the policy of every respectable bond house.

Q. In other words, that is due to the fact that you desire to keep your reputation as a brokerage house, dealing in securities of this kind, beyond question in regard to the securities you deal in?

A. Yes sir, if we can, we would like to make it a little better than that. Our reputation is our best asset.

Cross-examination.

By Mr. Brock:

Q. Was it you who wrote the plaintiff that they would be expected to bear their part of the expense?

A. No sir. I did not put it that way, that they would be expected to bear their part of the expense. My recollection is that we did not assume to bear the entire expense. In other words, while we have no immediate intention of calling on them to pay any part of the expenses, still we do not want to obligate ourselves to pay every expense that might be incurred, because it might conceivably embarrass us to do so.

Q. Did anyone, any officer or agent of your company have anything to do with the transaction with the Home Savings Bank excepting the particular persons who have been mentioned in this deposition?

A. No sir. I would qualify that however, to this extent, I am under the impression that Mr. Holtz, subsequent to the transaction, that is the purchase of the certificate, and since the default was written some letters in my absence, but that is all.

Q. I have reference to the two transactions prior to the commencement.

A. No sir.

50 Mr. ZANE: In connection with the deposition of Mr. Coffin, we offer in evidence Plaintiff's Exhibit A, together with the notarial protest.

We also offer Plaintiff's Exhibit B.

Which was objected to as immaterial by counsel for defendant.

The counsel for plaintiff offered in evidence Plaintiff's Exhibit C.

Which was objected to by counsel for defendant.

Plaintiff's counsel offered in evidence Plaintiff's Exhibit D and Plaintiff's Exhibit E.

Counsel for Plaintiff offered in evidence in connection with the foregoing deposition, Plaintiff's Exhibit F.

Mr. BROCK: I have already objected to that.

Counsel for plaintiff thereupon offered in evidence in connection with the foregoing deposition, Plaintiff's Exhibit G.

Mr. ZANE: And we will substitute copies in the deposition and hold the original exhibits, subject to their production in court if called for upon the trial of the cause.

Mr. BROCK: If required at the trial.

Mr. ZANE: Yes, if you want them.

The deposition of Karl R. Davies, taken before E. Bentley Hamilton, a Notary Public within and for the County of Cook in the State of Illinois, in the City of Chicago, Illinois, on the 17th day of February, A. D. 1910, on behalf of the plaintiff; the witness being first duly sworn testified as follows:

Direct examination.

By Mr. ZANE:

Q. State your name, please?
A. Karl R. Davies.
Q. Where do you reside, Mr. Davies.
A. Detroit, Michigan.
Q. Are you in business there?
A. I am.
Q. In a partnership or in a corporation, or how?
A. I operate under the name of Karl R. Davies & Company.
Q. But you are the "& Company"?
A. I am the whole thing.
Q. Now, what is your business?
A. My business is the sale of investment securities.
Q. Were you so engaged in this business in the year 1908?
A. I was, sir.

51 Q. I draw your attention to a certificate of indebtedness of the City and County of Denver, State of Colorado, num-

bered 1, for $11,250.00, and ask you if you ever saw that certificate or ever had any connection with its sale (handing same to witness), said paper being marked Plaintiff's Exhibit A?

A. To the best of my knowledge and belief I believe I have seen that certificate before, at the First National Bank of Detroit.

Q. Did you negotiate any sale of that certificate?

A. I did, to the Home Savings Bank?

Q. Of Detroit?

A. Of Detroit.

Q. When was that?

A. I cannot give you the exact date, that ought to be on Holtz's bill.

Q. It is shown by the paper, but I thought possibly you would remember it.

A. No, I don't remember it. We had so many of those transactions. The certificate was billed from Holtz to the Home Savings bank.

Q. Who brought the certificate to your attention first?

A. How do you mean? In what way?

Q. For sale.

A. Mr. Le Maistre.

Q. He was representing H. T. Holtz & Company?

A. He was their representative, their traveling representative.

Q. And you had the negotiations with the Home Savings Bank?

A. My man, Mr. A. W. Ehrmann concluded the sale to the Home Savings Bank.

Q. And what was the sale for? Do you remember the figures?

A. No sir, I cannot give those.

Q. You would only recollect that by seeing the bill?

A. That I would only recollect by seeing the bill.

Q. Did you ever see the bill?

A. I saw the whole thing over at the First National Bank. The whole thing was called to my attention over there.

Q. I show you Plaintiff's Exhibit I and Plaintiff's Exhibit J, the one being a letter transmitting the certificate to the First National Bank of Detroit and the other the bill for the same, made by H. T. Holtz & Comapny, to the Home Savings Bank of Detroit, and ask if these are the papers that were at the First National Bank that you saw (handing same to witness)?

A. (After having examined the papers). Those papers are the same that I saw, to the best of my knowledge and belief.

Q. The sale was a regular sale in due course of business, like any other sale of municipal securities made by you?

A. Yes sir.

52 MR. ZANE: I think that is all.

Cross-examination.

By MR. BROCK:

Q. Who do you say first brought the certificate to your attention, Mr. Davies?

A. Mr. Le Maistre, of Holtz & Company.

Q. Was it as his suggestion that the matter was taken up with the Home Savings Bank?

A. No, it was not at his suggestion at all.

Q. Tell us what occurred between you and Mr. Le Maistre?

A. Nothing occurred only in this way, that he probably came into the office with that and offered it at a price that looked attractive, and I said "possibly I can handle that for you among some of my clients in the city of Detroit."

Q. Did you have any information at that time, or did he give you any information as to what the certificate was issued for?

A. He had a circular—that is the information—drawn up in such form as bonds and certificates usually are.

Q. You mean a circular prepared by his house?

A. A circular prepared by his house.

Q. You knew then that this certificate had been issued on account of the purchase of voting machines?

A. I don't recollect whether I knew it was issued for voting machines or what it was for. I knew that it was a certificate of indebtedness of the City of Denver at that time.

Q. Did you know anything about the Federal Ballot Machine Company?

A. No, I had no knowledge of them.

Q. Who first from your office took the matter up with the Home Savings Bank?

A. Mr. Ehrmann.

Q. By whom was the transaction closed? By you or by him?

A. By Mr. Ehrmann.

Q. By Mr. Ehrmann?

A. Yes sir.

Q. And not by you?

A. Not by me personally.

Q. Are you sure of that, Mr. Davies?

A. Well, as far as I can remember. I might have arranged the details of the delivery of the certificates, don't you know, and all that sort of thing; but Ehrmann made the sale.

Q. Do you mean that the final transaction as between the Home Savings Bank——

A. The confirmation——

Q. (Continuing:) —and you was concluded by Mr. Ehrmann or by you?

A. The confirmation was by myself, over the telephone, I presume, to the Home Savings Bank. Mr. Ehrmann conducted the negotiation, the same as any other man in the office would.

53 Q. The Home Savings Bank agreed to purchase this certificate before you had any conversation with them at all?

A. They had practically agreed to purchase it.

Q. Who was it you talked to of the Home Savings Bank people about this certificate?

A. Mr. Haass.

Q. What was said between you and him?

A. I don't recall only he said there were certain documents that

were necessary for his legal department to have, and which I called on Holtz & Company, I think, to furnish.

Q. Do you know exactly what the agreement was as made either by [your]or by Mr. Ehrmann acting for you with Mr. Haass?

A. In what way do you mean? What form of agreement do you mean?

Q. I have reference to the terms of the sale.

A. The terms of the sale were cash on delivery.

Q. What is that?

A. The terms of the sale were cash on delivery. When the certificate is delivered to the——

Q. There was no written evidence of your agreement entered into at all?

A. No. We do not usually have that in the bond business.

Q. Was there any conversation between you and Mr. Haass as to the probability or improbability of this certificate being paid at maturity?

A. Not that I know of. I think they looked upon the City and County of Denver as being all right, from their past record.

Q. Anything said between you and him as to the transaction between the Ballot Machine Company and the City and County of Denver upon which this certificate had been issued?

A. I don't remember that the Federal Ballot Machine Company entered into the matter at all. They simply looked to the City and County of Denver to take care of this obligation.

Q. Did you make any sort of an agreement or have any sort of an understanding with Mr. Haass as to what should take place in the event that the City and County of Denver did not pay this certificate?

A. I don't remember of ever making any agreement with Mr. Haass of any kind. I think he was perfectly satisfied with the standing of the City and County of Denver.

Q. In the sale of this certificate, Mr. Davies, do you say that there were no conditions or strings attached to it at all?

A. I cannot remember any.

Q. Was there anything said as to whether, in the event of a suit over it, that part of the expense would be borne by you or by Holtz & Company?

54 A. No sir, we never make any agreements of that kind.

Q. I am simply trying to find out whether you did in that case. You say you did not?

A. No, we did not.

Q. Nothing of that sort was discussed?

A. No. It was a straight sale, and those things are not discussed in a straight sale.

Q. You understand, that that is just what I am trying to find out. This was then a straight out and out sale?

A. It was a straight and legitimate sale.

Q. With no conditions whatever attached to it?

A. No conditions whatever. He was to pay his money the same as if I were to sell you 50 shares of stock of the Chicago Edison

Company, I would deliver to you a certificate, and you would pay me the money.

Q. And there were no conditions whatever attached to it?

A. No.

Q. You are not able to say whether Mr. Ehrmann and Mr. Haass entered into any conditional agreement about it?

A. I know that if there had been any conditional agreement I would have known of it.

Q. The deal was ultimately confirmed and closed by you?

A. Well, yes.

Q. You don't remember just when that was?

A. No I don't, I cannot recall.

Q. What commission did Holtz & Company get out of this?

A. I don't know.

Q. What commission did you get?

A. I think we got about $90.00. I think I paid Mr. Ehrmann $40. or $45. I have forgotten which.

Q. Is Mr. Ehrmann an employe of yours or does he work on commission?

A. He had formerly been with the old Detroit National Bank, and was not doing anything at that time, and he came to me on a commission basis temporarily.

Q. Where is Mr. Ehrmann now?

A. He is in the accounting business in the City of Detroit.

Q. When did you first hear that this certificate had not been paid at maturity?

A. I cannot state that, only that I was in to see Mr. Black, of the Detroit & Cleveland Navigation Company, to whom, through Mr. Phil McMillan, I sold one of these certificates also; and Mr. Black mentioned the fact that they had not paid the interest; and I remember I took it up with Holtz at that time to see what was the matter. I received several letters from Holtz & Company after that, giving the details of the trouble.

Q. Did you have any conversation with Mr. Haass about it?

55 A. I don't remember whether I dropped in there to see him or not about it. I guess I did. But what it was about I don't remember. I simply dropped into the bank there and asked him what he had heard.

Q. Among the written documents which you used in connection with the sale, was a copy of a contract between the City and County of Denver and the Federal Ballot Machine Company placed in your hands?

A. I don't recall. There were certain papers which were received which we turned over to the Home Savings Bank and had their attorney examine. Just what those documents were I cannot recall; but I presume that all the details were there.

Q. Do you remember anything about the guaranties made as to the efficiency of these ballot machines in that agreement?

A. No, I do not. We have so many of these things. At the time they impress us, but when a deal is all closed they are liable to slip

one's memory. I should presume though, that the machines had been satisfactory or they would not have paid for them, because that is generally the method of handling business matters of that kind.

Q. Do you remember whether you discussed with Mr. Haass this written instrument containing the guaranties as to the efficiency of the machines?

A. No, I took it for granted that the machines were all right or they would not have paid for them.

As appears elsewhere herein, the signature of this witness to the foregiong deposition was waived by agreement of counsel.

PLAINTIFF'S EXHIBIT A.—G. G. T.

Certificate of Indebtedness.

$11,250.00. No. 1.

City and County of Denver, State of Colorado.

The Federal Ballot Machine Company having presented its claim, for furnishing ballot machines, against the City and County of Denver, in the sum of Eleven Thousand Two Hundred and Fifty Dollars, and the same having been allowed at a regular meeting of the Board of County Commissioners of the City and County of Denver, State of Colorado, on the seventeenth day of February, 1908, *and* the Board of County Commissioners, being authorized thereto by the laws of the State of Colorado, Act of 1905, hereby issues its Certificate of Indebtedness for the said sum, and will in one (1) year pay to the order of the Federal Ballot Machine Company the sum of Eleven Thousand Two Hundred and Fifty Dollars,
56 with interest on *the* sum, from the date hereof, at the rate of five per cent. per annum; the said interest payable semi-annually, as per two (2) coupons hereto attached. Interest and Principal payable at the office of the County Treasurer of the City and County of Denver, Colorado. This Certificate is one of a series of ten issued in like sum, payable annually.

Signed by the Board of County Commissioners of the City and County of Denver, of the State of Colorado, by its Chairman, and attested by the County Clerk and Recorder with the seal of the County, authorized thereto by resolution of the 20th day of February, 1909.

Denver, Colorado, February 20th, 1908.

BOARD OF COUNTY COMMISSIONERS OF
THE CITY AND COUNTY OF DENVER,

[SEAL.] By S. C. D. HAYES, *Chairman.*

Attest:

ALBION K. VICKERY,
County Clerk and Recorder of the City and County of Denver, Colorado.

The following is written across the face of the foregoing certificate, with a red ink stamp and partly in handwriting in ink:

Protested Feby. 23, 1909, for non-payment Geo. O. Dostal, Notary Public.

The following appears on the back of the foregoing certificate: Pay to the order of The Home Savings Bank, Detroit, Mich. Federal Ballot Machine Co. A. Andrew, Vice-Prest.

No. 1. $11,250.00.

City and County of Denver,
Colorado,
to
Federal Ballot Machine Co.
Certificate of Indebtedness.

Due February 20th, 19—

Semi-Annual Interest Coupons, $281.25 payable 20th of August, and February.

Copy.

Certificate of Indebtedness.

$11,250.00. No. 1.

City and County of Denver, State of Colorado.

57 The Federal Ballot Machine Company having presented its claim, for furnishing ballot machines, against the City and County of Denver in the sum of Eleven Thousand Two Hundred and Fifty Dollars, and the same having been allowed at a regular meeting of the Board of County Commissioners of the City and County of Denver, State of Colorado, on the seventeenth day of February, 1908, *and* the Board of County Commissioners, being authorized thereto by the laws of the State of Colorado, Act of 1905, hereby issues its Certificate of Indebtedness for the said sum, and will in one (1) year pay to the order of the Federal Ballot Machine Company the sum of Eleven Thousand Two hundred and Fifty Dollars, with interest on this sum, from the date hereof, at the rate of five per cent per annum; the said interest payable semi-annually, as per two (2) coupons, hereto attached. Interest and principal payable at the office of the County Treasurer of the City and County of Denver, Colorado. This Certificate is one of a series of ten issued in like sum, payable annually.

Signed by the Board of County Commissioners of the City and County of Denver, of the State of Colorado, by its Chairman, and attested by the County Clerk and Recorder with the seal of the County, authorized thereto by resolution of the 20th day of February, 1908.

Denver, Colorado, February 20, 1908.

BOARD OF COUNTY COMMISSIONERS
OF THE CITY AND COUNTY OF
DENVER,

[SEAL.] By S. D. C. HAYS, *Chairman.*

Attest:
ALBION K. VICKERY,
County Clerk and Recorder of the
City and County of Denver, Colorado.

STATE OF COLORADO,
City and County of Denver, ss:

Be It Known, That on the 23rd day of February, in the year of our Lord nineteen hundred and nine at the request of the Denver National Bank, I, George O. Dostal, a notary public, duly admitted and sworn, dwelling in Denver, City and County of Denver, and State aforesaid, presented the original note of which the above is a true copy at the office of The County Treas'r of the City and County of Denver and demanded payment thereof, which was refused; reason cannot pay whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do solemnly protest, as well against the maker *and* endorser of the said note.

58 And I, the said notary, do hereby certify that on the same day and year above written, I deposited in the post office in said Denver, notice of the foregoing protest, partly written and partly printed, signed by me and folded in the form of letters, as follows, viz: Notice for Board of County Commissioners Directed Denver, Colo. Notice Treas'r of City and Co. of Denver directed Denver, Colo. Notice Federal Ballot Machine Co. directed San Francisco, Calif. Notice Home Savings Bank, directed Detroit, Mich., being their respective reputed place- of residence and nearest post office thereto; and further that on the day and year aforesaid, I served like notices of the foregoing protests, as follows, viz:
Notice for —.

In Witness Whereof, I have hereunto subscribed my name and affixed my seal of office at Denver, aforesaid, this 23rd day of February, A. D. 1909.
In Testimonium Veri*a*tes. My commission expires January 3, 1912.

Fees:

Noting and Recording.....	$1.75
4 notices @ 50.....	2.00
	$3.75

[SEAL.] GEO. O. DOSTAL,
Notary Public.

PLAINTIFF'S EXHIBIT B.—G. G. T.

H. P. Bennet, Jr.,
Attorney at Law.
With First National Bank.

DENVER, COLO., Feb. 26, '08.

To Whom It May Concern:

I hereby certify that I have made careful examination of the laws and all proceedings pertaining to the purchase by the City and County of Denver, State of Colorado, of one hundred and fifty Dean Ballot Machines from the Federal Ballot Machine Co. and the is-

suance and delivery to said Company of Certificates of Indebtedness for the aggregate sum of $112,500 in payment therefor and in my opinion the said Certificates of Indebtedness being Nos. one to ten both inclusive with interest coupons thereto attached, were duly issued and delivered in full compliance with law, that all proceedings relating thereto were regularly had and that said certificates and all thereof are good and valid securities and binding
59 obligations to the legal holder or holders thereof, on the part of said City and County of Denver, payment whereof is enforcible, if necessary, in any competent tribunal.

H. P. BENNET, JR., *Attorney.*

PLAINTIFF'S EXHIBIT C.—G. G. T.

Shope, Zane, Busby & Weber,
Attorneys and Counsellors,
1500 Title and Trust Building, 100 Washington St.

Simeon P. Shope.
John M. Zane.
Leonard A. Busby.
Harry P. Weber.
Hayes McKinney.

Cable Address, "Zanewebber," Chicago.

CHICAGO, April 10, 1908.

$112,500 5% ten year, Serial Certificates of Indebtedness, dated February 20, 1908, of the City and County of Denver, Colorado.

We have examined a certified transcript of the record of proceedings had preliminary to the issuance of the $112,500 5% Ten Year, Serial Certificates of Indebtedness, dated February 20, 1908, of the City and County of Denver, Colorado, and in our opinion such proceedings show lawful authority to issue said certificates of indebtedness under the laws and constitution of the state of Colorado now in force.

We have also examined a copy of the form of certificate prepared for such issue; and in our opinion said certificates, to the amount named, are in legal effect the valid and binding obligations of said City and County of Denver, in its corporate character as a county, and all of the taxable property situate therein is subject to the levy of a tax to pay the same.

SHOPE, ZANE, BUSBY & WEBER.

Federal Ballot Machine Co.

PLAINTIFF'S EXHIBIT D.—G. G. T.

On the 20th day of February, 1909, the Board of County Commissioners of the City and County of Denver, State of Colorado, will pay to the order of the Federal Ballot Machine Company, at the

office of the County Treasurer of the City and County of
60 Denver, Colorado, two hundred eighty-one and one quarter dollars, being six months' interest to that date on Certificate of Indebtedness No. 1, for $11,250.00.

BOARD OF COUNTY COMMISSIONERS OF
THE CITY AND COUNTY OF DENVER.
S. D. C. HAYS, *Chairman.*

Attest:
ALBION K. VICKERY,
County Clerk and Recorder of the City and County of Denver, Colorado.

The following appears across the face of the foregoing, partly stamped in red ink and partly in handwriting in ink:
Protested Feb'y 23, 1909, for non-payment.
GEO. O. DOSTAL,
Notary Public.

The following is endorsed on the back of the foregoing: Federal Ballot Machine, A. Andrew, Vice-Pres't.

Copy.

On the 20th day of February, 1909, the Board of County Commissioners of the City and County of Denver, State of Colorado, will pay to the order of The Federal Ballot Machine Company, at the office of the County Treasurer of the City and County of Denver, Colorado, two hundred eighty-one and one quarter dollars, being six months' interest to that date on Certificate of Indebtedness No. 1 for $11,250.00.

BOARD OF COUNTY COMMISSIONERS OF
THE CITY AND COUNTY OF DENVER,
COLORADO,
By S. D. C. HAYS, *Chairman.*

Attest:
ALBION K. VICKERY,
County Clerk and Recorder of the City and County of Denver, Colorado.

STATE OF COLORADO,
City and County of Denver, ss:

Be it Known, that on the 23rd day of February, in the year of our Lord nineteen hundred and nine at the request of the Denver National Bank, I, George O. Dostal, a notary public, duly admitted and sworn, dwelling in Denver, City and County of Denver, and State aforesaid, presented the original note of which the above is a true copy at the office of the County Treas'r of the City and
61 County of Denver and demanded payment thereof, which was refused; reason can not pay. Whereupon I, the said

notary, at the request aforesaid, did protest, and by these presents do solemnly protest, as well against the maker *and* endorser of the said note.

And I, the said notary, do hereby certify that on the said day and year above written, I deposited in the post office in said Denver, notice of the foregoing protest, partly written and partly printed, signed by me and folded in the form of letters, as follows, viz:

Notice for Board of County Commissioners directed Denver, Colo. Notice County Treasurer of City & Co. of Denver, Denver, Colo. Notice Federal Ballot Machine Co. directed San Francisco, Califa. Notice Home Savings Bank directed Detroit, Michigan, being their respective reputed place of residence and nearest post office thereto; and further, that on the day and year aforesaid, I served like notices of the foregoing protests, as follows, viz:

Notice for —.

In Witness Whereof, I have hereunto subscribed my name and affixed my seal of office at Denver, aforesaid, this 23rd day of February, A. D. 1909.

[SEAL.] In Testimonium Veriates. My commission expires January 3, 1912.

[SEAL.] GEO. O. DOSTAL,
Notary Public.

Fees:

Noting and Recording.....	$1.75
4 notices @ 50.....	2.00
	$3.75

PLAINTIFF'S EXHIBIT E.—G. G. T.

Director George W. Reed offered the following resolution, which was seconded by Director Leavitt and adopted by the unanimous affirmative vote of all the Directors:

"Resolution.

Resolved, that Mr. Adam Andrew, of San Francisco, on behalf of this corporation, be and he is hereby empowered and authorized to convey, assign, sell, set over, and deliver all of the assets of this corporation consisting of good will, patent, patent rights, inventions, factory, factory site, leases and all assets excepting existing contracts,
62 upon such terms and conditions as in his judgment may seem just and fair, and to and for the best interests of this corporation, to such person, persons, or corporation as may in his judgment seem to be for the best interests of this corporation, and in that behalf he is hereby empowered to sign, execute and deliver as the act of this corporation any and all instruments and documents necessary to carry out and effectuate such sale and conveyance."

I, George W. Reed, Secretary of the Federal Ballot Machine Company, a corporation, do hereby certify that the above and foregoing

resolution was unanimously passed and adopted by the affirmative vote of the entire Board of Directors, of this corporation at a meeting of said board of directors duly and regularly called and held at the office and principal place of business of said corporation on the first day of February, 1908, and that said resolution has not been repealed, modified or set aside, and now is in full force and effect.

In Witness Whereof, I have hereunto set my hand and affixed the seal of this corporation, this 1st day of February, 1908.

[SEAL.] GEO. W. REED,
Secretary of the Federal Ballot Machine Company.

PLAINTIFF'S EXHIBIT F.—G. G. T.

Copy.

April 30, 1908.

To Whom It May Concern:

This is to certify that Adam Andrew, Vice-President of the Federal Ballot Machine Company, is duly authorized and empowered by and on behalf of the Federal Ballot Machine Company, to endorse, deliver and dispose of all the ten Certificates of Indebtedness of the City and County of Denver, dated February 20, 1908, due one to ten years respectively after date, each in the sum of $11,250, with interest payable semi-annually at the rate of 5% per annum, all of which are payable to the order of the Federal Ballot Machine Company.

(Signed) THOMAS H. WILLIAMS,
President of Federal Ballot Machine Co.

(Signed) GEO. W. REED,
[SEAL.] *Secretary.*

This is to certify that the above and foregoing is a true and correct copy of the original certificate held by us.

ILLINOIS TRUST & SAVINGS BANK,
By WM. H. HENKLE, *Secretary.*

63 PLAINTIFF'S EXHIBIT G.—G. G. T.

No. 561.

CHICAGO, June 22, 1908.

The National City Bank of Chicago.

Pay to the order of Federal Ballot Machine Co. $11,099.99.
Eleven thousand ninety nine & 99/100 Dollars.

H. T. HOLTZ & CO.

On the back of the foregoing is the following endorsement, partly stamped in purple ink and partly in handwriting in ink:

Pay to the order of The Continental National Bank of Chicago, Federal Ballot Mch. Co. by Adam Andrew, Vice-pres't.

Paid through Chicago Clearing House 11 Jun- 24 1908 to The Continental National Bank.

PLAINTIFF'S EXHIBIT H.—G. G. T.

No. 12091.

The Home Savings Bank.

$11,355.63.

Demand.
Certificate of Deposit.

$11,355. DETROIT, MICH., Jun- 19, 1908.

Julius H. Haass Cash'r has deposited in this Bank Eleven Thousand Three Hundred Fifty-five 63/100 Dollars, payable to the order of First Nat'l Bank, Detroit in current funds, on the return of this Certificate properly endorsed.

[C. A. ZAES,]*
Ass't Cashier.

[JOHN W. SCHMITT,]* *Teller.*

Signatures cancelled by D. X. Teller, after payment.
The Home Savings Bank Building, Cor. Michigan Ave. & Griswold St.

The following appears on the back of the foregoing exhibit:
Paid through Detroit Clearing House Jun- 20 1908. All prior restrictive endorsements guaranteed, to First National Bank.

PLAINTIFF'S EXHIBIT I.—G. G. T.

H. T. Holtz & Co.
171 La Salle Street, Chicago.
Public Securities. Incorporated. Paid in Capital $100,000.

64 June 10, 1908.

First National Bank, Detroit, Mich.

DEAR SIRS: We enclose herewith Certificate of Indebtedness No. 1 of the City and County of Denver, State of Colorado, due in 1909, for $11,250 with August 1908 and February 1909 Coupons attached, together with bill against Messrs. Karl R. Davies & Co. of Detroit. Please deliver this Certificate to Messrs. Karl R. Davies & Co. on receipt of the amount named in the bill, which please remit to us less your usual charge.

Yours very truly,

H. T. HOLTZ & CO.

Encl.

[*Erased in copy.]

Attached to the above is the following written in handwriting in ink: Davies' clients require authority of Vice-Pres't to endorse for Ballot Co. also certified transcript of the record of proceedings authorizing the issuance of the Certificates of Indebtedness by City and County of Denver. Please wire instructions.

PLAINTIFF'S EXHIBIT J.—G. G. T.

H. T. Holtz & Co.,
171 La Salle Street.

CHICAGO, 6/19/08.

Home Savings Bank, Detroit, Mich.

To Certificate of Indebtedness No. 1 of the City and County of Denver, State of Colo. due in 1909, for $11,250 @ 99.30	$11,171.25
Accrued interest February 20–June 19, both incl., @ 5%	184.38
Total	$11,355.63

Received Payment,

H. T. HOLTZ & CO.,
By M. A. AUER.

I, G. G. Taylor, do hereby certify that I reported in shorthand the testimony of the witnesses in the foregoing deposition; that I have correctly reduced it to writing as hereinbefore appears and that I have caused to be inserted in the deposition the exhibits offered, by means of full, true and correct copies thereof.

G. G. TAYLOR,
Stenographic Reporter.

STATE OF ILLINOIS,
County of Cook, ss:

I, E. Bentley Hamilton, a notary public in and for the County and State aforesaid, duly appointed, qualified and acting, do
65 hereby, in pursuance of the annexed stipulation, certify that on Tuesday, the 15th day of February, 1910, and continuing until the 17th day of February, 1910, before me at my office in Room 1500, 100 Washington Street, Chicago, at the hour of 10:00 o'clock A. M. of the first named day, continuing until the hour of 10:00 o'clock A. M. of the second named day appeared the attorneys stated in the deposition, representing the respective parties hereto, and also appeared G. G. Taylor, Stenographic Reporter, who was appointed by me to take the deposition enclosed, and was then and there duly sworn to correctly report the deposition about to be taken; and also appeared before me at said time and place the following named witnesses:

Charles Howells Coffin, Fontaine Le Maistre, Ole Christian Olsen Julius H. Haass, Karl R. Davis,

each of whom was thereupon duly sworn to depose to the truth, the whole truth and nothing but the truth regarding the issues in a cause now pending in the -ircuit Court of the United States in and for the District of Colorado, wherein the Home Savings Bank is plaintiff and the Board of County Commissioners of the City and County of Denver is defendant.

Whereupon, each of the said witnesses was examined on oral interrogatories, by the said counsel for the respective parties and the questions and answers thereto were taken down by the said stenographer, with the objections as the same were made, and by him were reduced to typewriting, the signatures to said depositions by the respective witnesses having been waived by counsel for the respective parties appearing before me. And said depositions, so taken having been sworn to are herein contained as the same were taken, which said depositions with the original stipulation for the taking of the same I have attached to this certificate and have deposited in the mail, postage prepaid, directed to Charles W. Bishop, Esquire, Clerk of the Circuit Court of the United States within and for the District of Colorado, at the City of Denver, Colorado.

I also certify that in pursuance of the agreement of counsel for the respective parties made before me that the documentary evidence noted in said depositions and introduced by counsel was identified by the mark of the exhibit number and the initials of said stenographer, and offered in evidence and admitted and truly and accurately copied by the said stenographer, who has in-
66 serted such copies in the said deposition, and the original documents have been retained by the parties, subject to the production of the same in court upon the trial of this action if called for.

In Witness Whereof, I have hereunto set my hand and official seal this 17th day of February, A. D. 1910, at Chicago, Illinois.

[SEAL.] E. BENTLEY HAMILTON,
Notary Public.

Notary's fees $72 05/100 Paid by The Home Savings Bank.

And thereupon the plaintiff rested its case.

And the defendant offered no evidence in its behalf.

And thereupon the defendant, by its counsel, moved the Court for a non suit based upon the questions of law already raised by the defendant in the motion to strike parts of the complaint and again raised in demurrer to the answer.

Which motion was by the Court denied.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

And thereupon the defendant, by its counsel, moved the Court for a directed verdict on its behalf.

Which motion was by the Court denied.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

And thereupon the defendant rested its case.

And the above and foregoing is all the evidence given, offered or received upon the trial of said cause.

And thereupon the plaintiff, by its counsel, moved for a directed verdict on its behalf in the sum of $12,374.76 on both counts.

The COURT: Verdict, of course, will be directed for the plaintiff. Enter judgment for plaintiff, as on the verdict of the jury, for $12,374.76 and for costs.

To which ruling of the Court in directing a verdict for plaintiff, and to the entry thereof, and to the entry of judgment thereon, separately, the defendant, by its counsel, then and there duly excepted.

And thereafter and on to-wit, the 5th day of August, A. D. 1910, the defendant filed in said court a motion for a new trial, for the following reasons, to-wit:

67 1. That the court erred in denying defendant's motion to strike from the complaint the word "negotiable" as used in line 7, line 14 and line 19 on page 2; line 24 and line 31 on page 3; line 15 and line 23 on page 4; and line 27 on page 5 of said complaint.

2. The court erred in overruling the defendant's motion to strike out the following language found on page 3 of said complaint to-wit:

"Thereupon the said negotiable bond or certificate of indebtedness was duly protested for non-payment and the plaintiff paid the protest fees on account thereof in the sum of three dollars and seventy-five cents ($3.75)."

3. The court erred in overruling the defendant's motion to strike out the following language found on page 6 of said complaint, to-wit:

"And thereupon said interest coupon was duly protested for non-payment and the plaintiff paid protest fees on account thereof in the sum of three dollars and seventy-five cents ($3.75)."

4. The court erred in sustaining the demurrers of the plaintiff to the third defense contained in both the original and the amended answer.

5. The court erred in ruling that the instruments sued on in the complaint were negotiable.

6. The court erred in overruling the defendant's motion for a non-suit.

7. The court erred in overruling the defendant's motion for a directed verdict.

8. The court erred in granting plaintiff's motion for a directed verdict.

9. That the verdict is contrary to the evidence, and the judgment is contrary to law.

Which said motion for a new trial was by the court overruled.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

And thereupon the defendant asked and was granted thirty (30) days in which to file its bill of exceptions.

And now, forasmuch as the above and foregoing matters and things do not appear fully of record, the defendant tenders
68 this, its bill of exceptions, by it reserved herein, and prays that the same may be signed and sealed by the Judge of this court, and made a part of the record in said cause, pursuant to the statute in such case made and provided; which is accordingly done on this 1st day of September, A. D. 1910.

ROBT. E. LEWIS,
District Judge.

Approved:
C. W. WATERMAN,
Attorney for Plaintiff.

Endorsed: 5388. U. S. Circuit Court, District of Colorado. The Home Savings Bank vs. The Board of County Commissioners of the City and County of Denver. Defendant's Bill of Exceptions. Filed Sep. 1, 1910, Charles W. Bishop, Clerk.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States.

THE HOME SAVINGS BANK, Plaintiff,
v.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Defendant.

Petition for Writ of Error.

Comes now the Board of County Commissioners of the City and County of Denver, the defendant above named, by Milton Smith, Charles R. Brock and W. H. Ferguson, its attorneys, and alleges:

That on or about the second day of August, A. D. 1910, this court entered judgment in the above entitled case in favor of the plaintiff and against this defendant, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will in more detail appear from the assignment- of error, filed with this petition and made part hereof.

Wherefore this defendant prays that a writ of error may be issued in its behalf out of the United States Circuit Court of Appeals of the Eighth Judicial District for the correction of the errors so complained of, and that a transcript of the record and papers in this case, duly authenticated, may be sent to the said circuit court of appeals.

MILTON SMITH,
CHAS. R. BROCK,
WM. F. FERGUSON,
Attorneys for Defendant.

69 Endorsed: No. 5388. In the Circuit Court of the United States. The Home Savings Bank, Plaintiff, v. The Board of County Commissioners of the City and County of Denver, Defendant. Petition for Writ of Error. Filed Sep. 30, 1910. Charles W. Bishop, Clerk. Milton Smith, Chas. R. Brock, W. F. Ferguson, Attorneys for defendant.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States within and for said District.

THE HOME SAVINGS BANK, Plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Defendant.

Assignments of Error.

Comes now the defendant by Milton Smith, Charles R. Brock and W. H. Ferguson, its attorneys, and makes the following assignments of error which it avers occurred on the trial of this cause, to-wit:

1. That the court erred in denying defendant's motion to strike from the complaint the word "negotiable" as used in line 7, line 14 and line 19 on page 2; line 24 and line 31 on page 3; line 15 and line 23 on page 4, and line 27 on page 5 of said complaint.

2. The court erred in overruling defendant's motion to strike out the following language found on page 3 of said complaint, to-wit:

Thereupon the said negotiable bond or certificate of indebtedness was duly protested for non-payment and the plaintiff paid the protest fees on account thereof in the sum of three dollars and seventy-five cents ($3.75).

3. The court erred in overruling defendant's motion to strike out the following language found on page 6 of said complaint, to-wit:

And thereupon said interest coupon was duly protested for non-payment and the plaintiff paid the protest fees on account thereof in the sum of three dollars and seventy-five cents. ($3.75).

4. The court erred in sustaining the demurrers of the plaintiff to the third defense contained in both the original and the amended answer.

70 5. The court erred in ruling that the instruments sued on in the complaint were negotiable.

6. The court erred in overruling defendant's motion for a non-suit.

7. The court erred in overruling defendant's motion for a directed verdict.

8. The court erred in granting plaintiff's motion for a directed verdict.

9. That the verdict was contrary to the evidence.

10. That the judgment is contrary to law.

Wherefore this defendant prays that the judgment may be re-

versed and this action be dismissed and that it be given a judgment for its costs herein expended.

MILTON SMITH,
CHAS. R. BROCK,
WM. H. FERGUSON,
Attorneys for Defendant.

Endorsed: 5388. In the Circuit Court of the United States within and for the District of Colorado. The Home Savings Bank, Plaintiff, v. The Board of County Commissioners of the City and County of Denver, Defendant. Assignments of Error. Filed Sep. 30, 1910. Charles W. Bishop, Clerk. Milton Smith, Charles R. Brock and W. H. Ferguson, Attorneys for defendant.

Sixty-eighth Day, May Term, Friday, September 30th, A. D. 1910.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the third day of May, A. D. 1910.

5388.

THE HOME SAVINGS BANK
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER.

Money Demand.

The above cause coming on to be heard upon the petition of the defendant for a writ of error from the United States Circuit Court of Appeals of the Eighth Judicial Circuit to the United States Circuit Court for the District of Colorado, and upon the examination of said petition, the assignments of error presented therewith and the record in said cause, and desiring to give the petitioner an opportunity to prosecute in the said United States Circuit Court of Appeals, the questions presented by the record in said cause;

71 It is ordered that a writ of error be, and the same is hereby allowed to this court from the United States Circuit Court of Appeals of the Eighth Judicial Circuit, and the bond presented by the said petitioner in the penal sum of $15,000 [*has*] heretofore fixed by order of this court, be, and the same is hereby, approved.

Bond on Writ of Error.

THE UNITED STATES OF AMERICA,
District of Colorado:

Know All Men By These Presents, That we, The Board of County Commissioners of the City and County of Denver, state of Colorado, as principal, and The Empire State Surety Company of New York as surety, are held and firmly bound unto The Home Savings Bank,

in the full and just sum of fifteen thousand ($15,000.00) dollars to be paid to the said The Home Savings Bank, its successors or assigns, to which payment well and truly to be made, we bind ourselves, our successors and assigns jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of September, in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at the May term, A. D. 1910, of the United States Circuit Court, for the District of Colorado, sitting at Denver, in a suit pending in said court between The Home Savings Bank, a corporation, plaintiff, and The Board of County Commissioners of the City and County of Denver, state of Colorado, defendant, judgment was rendered against the said defendant in the sum of twelve thousand three hundred seventy-four and 76/100 ($12374.76) dollars, and the said The Board of County Commissioners of the City and County of Denver having obtained a writ of error to the United States Circuit Court of Appeals for the Eighth Circuit to reverse the judgment of the said Circuit Court; and a citation directed to the said The Home Savings Bank, citing and admonishing it to be and appear, in the United States Circuit Court of Appeals for the Eighth Circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation.

Now the condition of the above obligation is such, that if the said The Board of County Commissioners of the City and County of Denver, state of Colorado, shall prosecute said writ of error to effect, and answer all damages and costs, if it fails to make
72 good its plea, then the above obligation to be void, else to remain in full force and virtue.

[Seal, City and County of Denver.]

THE BOARD OF COUNTY COMMISSIONERS
OF THE CITY AND COUNTY OF DENVER,
By W. P. QUARTERMAN, *Chairman.*

Attest:
FRED W. BAILEY, *Clerk,*
By CHAS. W. COCHRAN, *Deputy.*

THE EMPIRE STATE SURETY COMPANY,
By JOHN R. GEMMILL,
Its Attorney-in-Fact.

[Corporate seal, Empire State Surety Company.]

Approved:
ROBT. E. LEWIS, *Judge.*

Endorsed: 5388. The Empire State Surety Company of New York. The Home Savings Bank vs. The Board of County Commissioners of the City and County of Denver. Bond on Appeal $15000.00. Filed Sep. 30, 1910. Charles W. Bishop, Clerk.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States.

THE HOME SAVINGS BANK, Plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Defendant.

Præcipe.

The clerk will prepare in the above entitled cause an authenticated copy of the entire record, including the complaint, summons, motion to strike parts of the complaint, answer, demurrer to the answer, amended answer, demurrer to the amended answer, replication, verdict, final judgment, motion for new trial, petition for writ of error, assignment of errors, bond on writ of error, order allowing writ of error, this præcipe, writ of error, citation, and every other pleading, motion or order filed or entered herein.

MILTON SMITH,
CHAS. R. BROCK,
WM. H. FERGUSON,
Attorneys for Defendant.

73 Endorsed: No. 5388. In the Circuit Court of the United States. The Home Savings Bank, Plaintiff, vs. The Board of County Commissioners of the City and County of Denver, Defendant. Præcipe for Transcript of the Record on Writ of Error to U. S. Circuit Court of Appeals. Filed Sep. 30, 1910. Charles W. Bishop, Clerk. Milton Smith, Chas. R. Brock, Wm. F. Ferguson, Attorneys for Defendant.

Writ of Errors, U. S. Circuit Court of Appeals.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Circuit Court of the United States for the District of Colorado, Greeting:

Beacuse in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you at the May Term, 1910, thereof, between The Home Savings Bank, plaintiff, and The Board of County Commissioners of the City and County of Denver a manifest error hath happened, to the great damage of the said The Board of County Commissioners of the City and County of Denver as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals, for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office

of the clerk of the United States circuit court of appeals, for the eighth circuit, on or before the 29th day of November, 1910, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable John M. Harlan, Associate Justice of the United States, this 30th day of September, in the year of our Lord, one thousand nine hundred and ten, and of the Independence of the United States, the 135th year.

74 Issued, at office in the city and county of Denver, in said district, with the seal of the circuit court of the United States for the district of Colorado, and dated as aforesaid.

[Seal U. S. Circuit Court, Dist. of Colorado.]

CHARLES W. BISHOP,
Clerk United States Circuit Court
District of Colorado.

Allowed by
ROBT. E. LEWIS, *Judge.*

Return.

THE UNITED STATES OF AMERICA,
District of Colorado, ss:

In obedience to the command of the within writ, I herewith transmit to the United States circuit court of appeals a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of the circuit court of the United States for the district of Colorado, at the city and county of Denver, in said district, this twenty-sixth day of October, 1910.

[Seal U. S. Circuit Court, Dist. of Colorado.]

CHARLES W. BISHOP, *Clerk.*

No. 5388. United States Circuit Court of Appeals Eighth Circuit. The Board of County Commissioners of the City and County of Denver Plaintiff in Error vs. The Home Savings Bank, Defendant in Error. Writ of Error. Filed Sep. 30 1910. Charles W. Bishop, Clerk.

Citation on Writ of Error, U. S. Circuit Court of Appeals

UNITED STATES OF AMERICA,
Eighth Judicial Circuit, ss:

In the United States Circuit Court of Appeals for the Eighth Circuit.

The United States of America to The Home Savings Bank, Greeting:

75 You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth

Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Colorado, sitting at Denver, wherein The Board of County Commissioners of the City and County of Denver is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, The Honorable Robert E. Lewis, Judge of the District Court of the United States for the District of Colorado and ex officio Judge of the Circuit Court of the United States for the District of Colorado, at Denver, in said District, this thirtieth day of September, A. D. 1910.

ROBERT E. LEWIS, *Judge.*

Proof of Service.

Received a copy of within Citation at Denver, Colo. this 30th day of Sept. 1910.

THE HOME SAVINGS BANK,
By CHARLES W. WATERMAN,
Its Att'y.

No. 5388. United States Circuit Court of Appeals, Eighth Circuit. The Board of County Commissioners of the City and County of Denver, Plaintiff in Error, vs. The Home Savings Bank, Defendant in Error. Citation. Filed Sep. 30, 1910. Charles W. Bishop, Clerk.

UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Charles W. Bishop, clerk of the Circuit Court of the United States for the District of Colorado, do hereby certify the above and foregoing pages numbered from one (1) to one hundred and three (103), both inclusive, to be a true, perfect, and complete transcript and copy of the pleadings and other matters set forth in the præcipe filed herein, together with a true copy of such præcipe, and defendant's bill of exceptions, heretofore filed or entered of record in said court and in a certain case lately in said court pending, wherein The Home Savings Bank was plaintiff and the
76 Board of County Commissioners of the City and County of Denver was defendant as fully and completely as the same still remain on file and of record in my office at Denver.

In Testimony to the above, I do hereunto sign my name and affix the seal of said court, at the City and County of Denver, in said district, this twenty-sixth day of October, A. D. 1910.

[Seal U. S. Circuit Court, Dist. of Colorado.]

CHARLES W. BISHOP, *Clerk.*

Filed Dec. 23, 1910. John D. Jordan, Clerk.

77 (*Appearance of Counsel for Plaintiff in Error.*)

On the third day of January, A. D. 1911, the appearance of counsel for plaintiff in error was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3526.

BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Plaintiff in Error,
vs.
HOME SAVINGS BANK.

The Clerk will enter our appearance as Counsel for the Plaintiff in Error.

MILTON SMITH.
CHAS. R. BROCK.
WM. H. FERGUSON.

824 Equitable Bldg., Denver, Colo.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3526. Board of County Commissioners of the City & County of Denver, Plaintiff in Error, vs. Home Savings Bank. Appearance. Filed Jan. 3, 1911, John D. Jordan, Clerk. Milton Smith, Charles R. Brock, William H. Ferguson, Counsel for Pl't'f in Error.

(*Appearance of Counsel for Defendant in Error.*)

And on the eighth day of February, A. D. 1911, the appearance of counsel for defendant in error was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3526.

THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Plaintiff in Error,
vs.
THE HOME SAVINGS BANK.

78 The Clerk will enter my appearance as Counsel for the Defendant in Error.

CHARLES W. WATERMAN.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3526. The Board of Co. Commissioners of the City & County of Denver, Plaintiff in Error, vs. The Home Savings Bank. Appearance. Filed Feb. 8, 1911, John D. Jordan, Clerk. Charles W. Waterman, Counsel for Defendant in Error.

(*Order of Submission.*)

And on the twenty-fifth day of September, A. D. 1911, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1911, Monday, September 25, 1911.

No. 3526.

THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Plaintiff in Error,
vs.
THE HOME SAVINGS BANK.

In Error to the Circuit Court of the United States for the District of Colorado.

This cause having been called for hearing in its regular order, argument was commenced by Mr. W. H. Ferguson for plaintiff in error, continued by Mr. Charles W. Waterman for defendant in error and concluded by Mr. W. H. Ferguson for plaintiff in error. Thereupon, this cause was submitted to the Court on the transcript of record from said Circuit Court and the briefs of counsel filed herein.

(*Opinion.*)

And on the twenty-fourth day of August, A. D. 1912, the opinion of the United States Circuit Court of Appeals for the Eighth Circuit was filed in said cause, in the words and figures following, to-wit:

79 United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1912.

No. 3526.

THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Plaintiff in Error,
vs.
THE HOME SAVINGS BANK, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Colorado.

Mr. W. H. Ferguson (Mr. Milton Smith and Mr. Charles R. Brock on the brief), for plaintiff in error.
Mr. Charles W. Waterman, for defendant in error.

Before Adams and Smith, Circuit Judges, and Reed, District Judge.

REED, District Judge, delivered the opinion of the court:

The Home Savings Bank, a Michigan banking corporation, which will be called the plaintiff, sued the City and County of Denver, a municipal corporation of Colorado, which will be called the defendant, to recover the amount of a certificate of indebtedness issued by its Board of Commissioners February 20, 1908, to the order of the Federal Ballot Machine Company an alleged corporation of California, which will be called the Machine Company, for $11,250, payable in one year, with interest from date at the rate of five per cent. payable semi-annually. There was a verdict and judgment for the plaintiff, and the defendant brings error.

The complaint alleges that on February 20, 1908, the defendant made and delivered to the machine company its negotiable bond or certificate of indebtedness, payable to the order of the machine company at the office of the treasurer of the defendant in one year for $11,250, with interest from date, payable semi-annually as per coupons attached, which said instrument it is alleged the machine company sold, endorsed and delivered to the plaintiff for value before maturity. The certificate of indebtedness, and second coupon are set out in the complaint and are as follows:

80 *Certificate of Indebtedness.*

"$11,250.00. No. 1.

"City and County of Denver, State of Colorado.

"The Federal Ballot Machine Company having presented its claim, for furnishing ballot machines, against the City and County of Denver, in the sum of eleven thousand two hundred and fifty dollars and the same having been allowed at a regular meeting of the Board of County Commissioners of the City and County of Denver, state of Colorado, on the seventeenth day of February, 1908, *and* the Board of County Commissioners, being authorized thereto by the laws of the state of Colorado, Act of 1905, hereby issues its certificate of indebtedness for the said sum, and will in one (1) year pay to the order of the Federal Ballot Machine Company the sum of eleven thousand two hundred and fifty dollars, with interest on this sum, from the date hereof, at the rate of five per cent. per annum; the said interest payable semi-annually, as per two (2) coupons, hereto attached. Interest and principal payable at the office of the County Treasurer of the City and County of Denver, Colorado. This certificate is one of a series of ten issued in like sum, payable annually.

"Signed by the Board of County Commissioners of the City and County of Denver, of the state of Colorado, by its chairman, and attested by the county clerk and recorder with the seal of the county, authorized thereto by resolution of the 20th day of February, 1908.

"Denver, Colorado, February 20th, 1908."

The instrument is endorsed as follows: "Pay to the order of The Home Savings Bank, Detroit, Mich. Federal Ballot Mach. Co. A. Andrew, Vice Prest."

Coupon No. 2 attached to the instrument is as follows:

"On the 20th day of February, 1909, the Board of County Commissioners of the City and County of Denver, state of Colorado, will pay to the order of The Federal Ballot Machine Company, at the office of the county treasurer of the City and County of Denver, Colorado, two hundred eighty-one and one quarter dollars, being six months' interest to that date on certificate of indebtedness No. 1 for $11,250.0.

BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, COLORADO,
By S. D. C. HAYS, *Chairman.*

Attest:
ALBION K. VICKERY,
County Clerk and Recorder of the City and County of Denver, Colorado.

Endorsed: Federal Ballot Mach. A. Andrew, Vice Pres't."

81 It is alleged that on the 23rd day of February, 1909, both instruments were presented to the treasurer of the defendant and payment demanded which was refused; that plaintiff thereupon caused them to be protested for non-payment, and paid $7.50 protest fees therefor. Judgment is asked against the defendant for the amount of said instruments with interest, and for the protest fees.

To this complaint the defendant filed a motion to strike therefrom the word "negotiable" where it appears therein, also the allegation that the instruments were protested, and plaintiff paid $7.50 as fees therefor; upon the ground that the word "negotiable" is but an expression of an erroneous legal conclusion as to the character of the certificate of indebtedness; that it affirmatively appears that the instruments sued upon are not negotiable; that neither could be legally protested, and the allegations of the complaint as to the payment of protest fees, are wholly irrelevant and immaterial. This motion was denied, but no exception was taken to the ruling, and the defendant was given twenty days thereafter in which to answer. Within such twenty days the defendant answered, and later, on January 5, 1910, filed an amended answer alleging three defenses to the complaint as follows:

First Defense: That it has not sufficient knowledge or information upon which to base a belief as to whether or not the Machine Company negotiated, transferred, endorsed, or delivered to the plaintiff for value or otherwise, the instruments sued upon; or as to whether the plaintiff is the owner of said instruments.

Second Defense: That the consideration for the execution of both the certificate of indebtedness and interest coupon mentioned in the complaint, has wholly failed, in that said certificate of indebtedness

was executed in part payment for 150 voting machines known as the Dean Ballot Machines, under an agreement made and entered into between the Federal Ballot Machine Company and this defendant on the 27th day of May, 1907, whereby the Machine Company agreed and guaranteed that each of said machines should conform in every particular to the constitution and statutes of the state of Colorado with respect to the holding of elections by means of said machines, and that they would perfectly and accurately perform the work of voting machines as required by said laws; that said machines do not conform to the constitution and statutes of Colorado, and do not accurately perform the work required by said constitution and laws; that in the use of said machines the secrecy of the ballot cannot be preserved; that the mechanism of the machines is so intricate and complicated that it is impossible for an elector by the use of said machines to vote a straight ticket, a mixed ticket, or an irregular ticket or any of them, and it is impossible for an elector by the use of said machines secretly to vote a split or irregular ticket; that their construction is such that an elector cannot cast a vote for
82 presidential electors without first divulging the names of the persons for whom he desires to vote, and it is impossible for an elector to vote for any particular elector; and that said machines are without any value whatever.

Upon information and belief it is alleged that the Machine Company is and was at the institution of the action the beneficial owner of the certificate of indebtedness and interest coupon set forth in the complaint; that neither thereof was before maturity, or at any time, in good faith and in due course of business negotiated, sold or transferred by the Machine Company or by any one to the plaintiff; that any transfer or delivery thereof, if any was ever at any time made, was for the sole purpose of enabling the plaintiff in its own name to prosecute this action for the purpose of thereby defeating the defense which the Machine Company knew existed against itself, and of which the plaintiff had notice prior to any alleged negotiation, transfer or delivery thereof to it.

The third defense is the same as the second, except that it omits the second part of paragraph of the second defense beginning with the words, "Upon information and belief" that the Machine Company is and was the owner of the instrument sued upon, etc.

The plaintiff demurred to each of these defenses upon the ground that none of them states any facts sufficient to constitute a defense to either the certificate of indebtedness or coupon set forth in the complaint. The demurrer was overruled, as to the first and second defenses, and sustained as to the third, January 27, 1910. No exception was taken by the defendant to the ruling. The plaintiff thereupon replied to the first and second defenses denying all of the allegations thereof; and upon the trial, which began August 2, 1910, offered and introduced testimony that it purchased the instruments sued upon in good faith, before maturity and for value, without notice of any defense thereto. The defendant offered no evidence, but at the close of the plaintiff's evidence moved for "a non-suit upon questions of law raised by defendant in the motion to strike parts

of the complaint," which motion was denied. The defendant then moved for a directed verdict in its favor, but stated no ground therefor, which motion was also denied, and to these rulings the defendant at the time excepted.

The plaintiff then moved for a directed verdict in its favor for the amount due upon the certificate of indebtedness and coupon sued upon, which motion was sustained and judgment rendered for the plaintiff against the defendant for the amount of said instruments and costs, to which ruling and judgment the defendant excepted.

A motion for new trial was afterwards made and denied, and the defendant excepted.

83 The defendant assigns as error that the Circuit Court erred, (1) in overruling its motion to strike from the complaint the word "negotiable" and the allegations of the protest of the instruments sued upon; (2) in sustaining the demurrer to the third defense alleged in its answer; (3) in ruling that the instruments sued upon were negotiable; (4) the denial of its motions for non-suit and for a directed verdict in its favor and (5) in rendering judgment for the plaintiff.

In argument the defendant contends:

1. That neither Sec. 8 of Article VII of the constitution of Colorado, nor the act of 1905, authorized the Board of County Commissioners of the City and County of Denver to issue negotiable certificates of indebtedness, and that the certificate and coupon sued upon were negotiable in form, and therefore void.

2. That even if the constitutional provision and statute in question should be held to authorize the issuance of negotiable bonds, the securities sued on in this action are not bonds, were never intended to be negotiable, and are not negotiable; and the plaintiff took them subject to any equities existing between the county and the payee.

Sec. 8, Art. VII of the constitution of Colorado was amended November 6, 1906, to read in this way, as set forth in the brief of counsel for defendant:

"All elections by the people shall be by ballot, and in case paper ballots are required to be used, every ballot shall be numbered in the order in which it shall be received, and the number recorded by the election officers on the list of voters opposite the name of the voter who presents the ballot. The election officers shall be sworn or affirmed not to inquire or disclose how any elector shall have voted. In all cases of contested elections, in which paper ballots are required to be used, the ballots cast may be counted and compared with the list of voters, and examined under such safeguards and regulations as may be provided by law. Nothing in this section, however, shall be construed to prevent the use of any machine or mechanical contrivance for the purpose of receiving and registering the votes cast at any election, provided that secrecy in voting be preserved.

"When the governing body of any county, city, city and county or town, including the City and County of Denver, and any city,

city and county or town which may be governed by the provisions of special charter, shall adopt and purchase a voting machine or voting machines, such governing body may provide for the payment therefor by the issuance of interest-bearing bonds, certificates of indebtedness or other obligations, which shall be a charge upon such city, city and county or town; such bonds, certificates or other
84 obligations may be made payable at such time or times, not exceeding ten years from the date of issue, as may be determined, but shall not be issued or sold at less than par."

April 10, 1905, the legislature of Colorado passed an act (Sec. 2342, Rev. Stat. Col. 1908) identical with Sec. 8, Art. VII of the constitution as amended, authorizing the use of voting machines at elections, to be effective on and after December 13, 1906, in the event only that the amendment of Sec. 8, Art. VII of the constitution should be adopted by the people at the general election in 1906; which amendment was so adopted.

We are of opinion that the record does not present the question urged by the defendant as above stated for our determination. The record shows that the defendant first moved the Circuit Court to strike from the complaint the word "negotiable" where it appears therein, and the averment of the protest of the instruments and the payment of the protest fees, upon the ground that the former was but a statement of an erroneous legal conclusion, and the latter because it affirmatively appeared that the instruments sued upon are not negotiable and could not legally be protested, and were, therefore, wholly irrelevant and immaterial. The motion was denied and defendant given twenty days in which to answer, but it saved no exception to the ruling. Within the twenty days defendant filed an answer to the complaint and later an amended answer. The answers were waivers of the alleged errors, if any, in the ruling upon the motion, even if the ruling had been excepted to. Travelers' Ins. Co. v. Redfield, 6 Colo. App. 196 (40 Pac. 195-197); Cerussite Mining Co. v. Anderson, 19 Colo. App. 307 (75 Pac. 158-159); Enright v. Midland Sampling & Ore Co., 33 Colo. 341 (80 Pac. 1041).

The word "negotiable" might well have been eliminated, or omitted originally, from the complaint without affecting in any way its legal sufficiency, for the instrument to which it referred was set forth in full in the complaint. Its nature and character thus appeared upon its face, and the allegation that it was "negotiable" could not and did not change its legal effect. The word was therefore mere surplusage and did not affect the issues. The motion to strike the averment of the protest and payment of the fees is made to rest upon the ground that "it affirmatively appears" that the instruments were not "negotiable" and could not, therefore, be legally protested. But the instruments upon their face are negotiable. There was no prejudicial error, therefore, in denying the motion, even if the proper exception had been saved to the order overruling it.

The authority of defendant's Board of Commissioners under the law of Colorado, to issue negotiable certificates of indebtedness, or the validity in its inception of the instrument sued upon was chal-

lenged in the Circuit Court, if at all, only by the demurrer to the third defense of the answer. The demurrer to that defense
85 was sustained, upon what ground does not appear, but no exception was saved to the ruling. Admitting without deciding, that the third defense raised the issue of the want of authority of the Board of Commissioners to issue the certificate as a negotiable instrument, or the legality of the instrument in its inception, the defendant, if it desired to test the correctness of the ruling sustaining the demurrer, should have excepted thereto at the time. This it did not do.

The Civil Code of Colorado provides:

SEC. 74. "When a demurrer is decided, either in term time or vacation, the court or judge shall immediately cause the decision thereof to be entered in the record, and may proceed to final judgment thereon in favor of the successful party, unless the unsuccessful party shall plead over or amend upon such terms as may be just, and the court or judge may fix the time for pleading over and filing amended pleadings; and if the same be not filed within the time so fixed, judgment by default may be entered as in other cases."

The purpose of this section is to prescribe the duty of the court or judge when a demurrer is decided. Anthony v. Slayden, 27 Colo. 144 (60 Pac. 826).

If it be said that judgment was not entered until after the trial and was then excepted to, the sufficient answer is, that the insufficiency of the third defense was determined by the ruling upon the demurrer thereto several months before, which was final in the Circuit Court, unless the defendant was allowed to amend, which it did not request nor the court allow, and no exception was then taken to the ruling. There is nothing, however, in any of the defenses that challenges the authority of the Board of Commissioners to issue the certificate of indebtedness as a negotiable instrument nor the legality or validity of the instrument in its inception, and it does not affirmatively appear from the record that either of these questions was ever presented to or determined by the Circuit Court. This court will not, therefore, consider or determine them. Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co., 114 Fed. 133-140 (52 C. C. A. 95; Hatcher v. Northwestern Nat. Ins. Co., 184 Fed. 23-25 (106 C. C. A. 225).

The office of an exception, in practice, is to challenge the correctness of the rulings or decisions of the trial court promptly when made, to the end that errors in such rulings may be corrected by the court itself, if, upon its attention being called thereto, it deems them to be erroneous; and to lay the foundation for their review if necessary, by the proper appellate tribunal. In the courts of the United States such an exception, taken immediately upon the ruling being made is indispensable to a review by the proper appellate court of the ruling. Railway Co. v. Heck, 102 U. S.
86 120; Newport News, etc., Ry. Co. v. Pace, 158 U. S. 36; Potter v. United States, 122 Fed. 49, 55 (58 C. C. A. 231).

In its second defense the defendant alleged the failure of the consideration for the certificate of indebtedness, or a breach of the guarantee of the Machine Company of the voting machines, as in

its third defense, and that plaintiff was not in good faith the owner of the instruments sued upon, but was prosecuting the action for the benefit of the Machine Company with knowledge of the defense thereto as against that company. This, if true, would be a good defense to the action, even if the defendant's Board of Commissioners were authorized to issue the certificate of indebtedness as a negotiable instrument. It was, therefore, open to the defendant to prove upon the trial, if it could do so, its second defense, but it made no attempt or offer to do so and moved for a nonsuit upon questions of law raised by "its motion previously made to strike parts of the complaint." But this motion did not challenge the legal sufficiency of the complaint to support a judgment for the plaintiff; for if the instrument had in fact been non-negotiable, as defendant contends that it was, the plaintiff would have been entitled to recover thereon in the absence of proof by the defendant of the failure of consideration.

A compulsory nonsuit, however, is not allowed in the courts of the United States, except where a statute of the state authorizes it. Central Transportation Co. v. Pullman's Car Co., 139 U. S. 24-39; Coughran v. Bigelow, 164 U. S. 301-307; the practice of directing a verdict for the defendant when the evidence is clearly insufficient to support a verdict for the plaintiff having taken its place. In fact the difference between a compulsory nonsuit and a directed verdict for the defendant is matter of form rather than of substance, except that in case of the former a new action may be brought, while in the case of a directed verdict and judgment thereon the action is ended unless a new trial is granted upon motion or on appeal. Oscanyon v. Arms Co., 103 U. S., 261-264; Hammergen v. Schuermier, 1 McCrary, 436 (Mr. Justice Miller). We are not referred to any statute of Colorado authorizing a compulsory nonsuit; but if there be such, the plaintiff gave evidence in support of its cause of action which, in the absence of proof by the defendant sustaining its second defense, or even if the instrument was not negotiable, would entitle the plaintiff to recover. There is nothing, therefore, upon which to base defendant's motion for nonsuit; and a directed verdict in its favor upon the evidence, clearly, would have been error. Both Motions were, therefore, properly denied.

87 The denial of the motion for new trial is not, of course, sufficient upon which to base a writ of error. Railway Co. v. Heck, 102 U. S. 120.

The judgment of the Circuit Court, is therefore, affirmed.

Filed August 24, 1912.

88 (*Judgment.*)

And on the second day of September, A. D. 1912, in the record of the proceedings of said Circuit Court of Appeals is a judgment in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1912, Monday, September 2, 1912.

No. 3526.

THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Plaintiff in Error,
vs.
THE HOME SAVINGS BANK.

In Error to the Circuit Court of the United States for the District of Colorado.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Colorado, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this cause, be, and the same is hereby, affirmed with costs; and that The Home Savings Bank have and recover against The Board of County Commissioners of the City and County of Denver the sum of twenty dollars for its costs herein and have execution therefor.

September 2, 1912.

(*Petition of Plaintiff in Error for a Rehearing.*)

And on the third day of October, A. D. 1912, a petition of the plaintiff in error for a rehearing was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3526.

THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Plaintiff in Error,
vs.
THE HOME SAVINGS BANK, Defendant in Error.

89 In Error to the Circuit Court of the United States for the District of Colorado.

Come now the board of county commissioners of the city and county of Denver, the plaintiff in error in the above entitled action, and petitions the court to grant a rehearing of this case, for the following reasons:

The court has erroneously refused to decide the merits of this controversy upon the ground that no exception was taken by the plaintiff in error to the ruling of the trial court upon the demurrer to the third defense of the answer. In thus announcing that the failure of the defendant to except to the ruling of the trial court

upon a demurrer precludes a review of that ruling by this tribunal, a most damaging error is committed. A practice which has prevailed from time immemorial is repudiated, or at least ignored. An innovation in conflict with the decisions of the supreme court of the United States and the common law rule controlling such matters, is established. The court utterly disregards the real office of a bill of exceptions, and unwittingly confuses matters which are already in the record, and which are and have always been subject to review without a bill of exceptions, with those matters which do not in the first instance constitute a part of the record, and which can only be brought into the record in the manner prescribed by statute.

The demurrer to the third defense of the answer and the issue of law raised thereby comprehended the only question urged in this or the trial court—that is, with respect to the negotiability of the certificate upon which the action is based. By the demurrer to the third defense, that question was raised upon the record. The ruling thereon being one of law, and constituting a part of the record proper, is subject to review in this court without a bill of exceptions. Such a ruling was subject to review from the earliest history of the writ of error, and was constantly and continually reviewed prior to the time when, in the reign of Edward I, the first statute in England was enacted, which afforded the means of bringing into the record by bill of exceptions matters which were not originally a part thereof. Without any reference to the common law rule, or the decisions of the supreme court, and without showing
90 any reason either upon principle or authority for so doing, the opinion, as written, overrules a practice which has prevailed for centuries. In principle, there is no necessity for this departure, which can only serve to increase the burdens of the profession, without in any respect facilitating the proper disposition of causes.

Wherefore, your petitioner prays that a rehearing may be granted herein, and in conformity with the previous practice a decision had upon the merits of the third defense of the answer, and, if it be found that said defense is sufficient in law, the judgment of the circuit court reversed.

W. H. BRYANT,
City Attorney;
MILTON SMITH,
W. H. FERGUSON,
CHARLES R. BROCK,
Attorneys for Plaintiff in Error.

I certify that in my judgment the above petition is well founded in law, and should be sustained.

I further certify, that said petition is not interposed for delay, but is filed in good faith, and solely that justice may be done.

September 18, 1912.

CHARLES R. BROCK,
Of Counsel for Plaintiff in Error.

(Endorsed:) Filed Oct. 3, 1912, John D. Jordan, Clerk.

(*Order Denying Petition for a Rehearing.*)

And on the sixth day of December, A. D. 1912, in the record of the proceedings of said Circuit Court of Appeals is an order denying the petition for a rehearing in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1912, Friday, December 6, 1912.

91 No. 3526.

THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Plaintiff in Error,
vs.
THE HOME SAVINGS BANK.

In Error to the Circuit Court of the United States for the District of Colorado.

This cause came on this day to be heard upon the petition for a rehearing, filed by Counsel for Plaintiff in Error.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby denied.

December 6, 1912.

92 (*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript contains full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of said United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause in said Court wherein the Board of County Commissioners of the City and County of Denver is Plaintiff in Error and The Home Savings Bank is Defendant in Error, No. 3526, as full, true and complete as the originals of the same remain on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this fifteenth day of January, A. D. 1913.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

93 In the United States Circuit Court of Appeals, Eighth Circuit.

No. 3526.

BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Plaintiff in Error,
v.
THE HOME SAVINGS BANK, Defendant in Error.

Stipulation.

It is hereby stipulated, that the transcript already filed in the Clerk's office of the supreme court of the United States, with the petition for writ of certiorari, be taken as a return to said writ. Dated this 2nd day of April, A. D. 1913.

CHARLES S. THOMAS,
WILLIAM H. BRYANT,
MILTON SMITH,
WILLIAM H. FERGUSON,
CHARLES R. BROCK,
Counsel for the Board of County Commissioners of the City and County of Denver.
CHARLES W. WATERMAN,
Counsel for The Home Savings Bank.

(Endorsed:) No. 3526. In the United States Circuit Court of Appeals, Eighth Circuit. Board of County Commissioners of the City and County of Denver, Plaintiff in Error, v. The Home Savings Bank, Defendant in Error. Stipulation as to Return to Writ of Certiorari. Filed Apr. 24, 1913. John D. Jordan, Clerk.

94 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Being informed that there is now pending before you a suit in which The Board of County Commissioners of the City and County of Denver is plaintiff in error, and The Home Savings Bank is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the District of Colorado, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do
95 hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of th
United States, the 5th day of April, in the year of our Lord on
thousand nine hundred and thirteen.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

96 *Return to Writ.*

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ of certiorari an
in pursuance of the stipulation of the parties, a full, true and com
plete copy of which is hereto attached, I hereby certify that th
transcript of record furnished with the application for a writ
certiorari in the case of The Board of County Commissioners of th
City and County of Denver, Plaintiff in Error, vs. The Home Saving
Bank, is a full, true and complete transcript of all the pleadings, pr
ceedings and record entries in said cause.

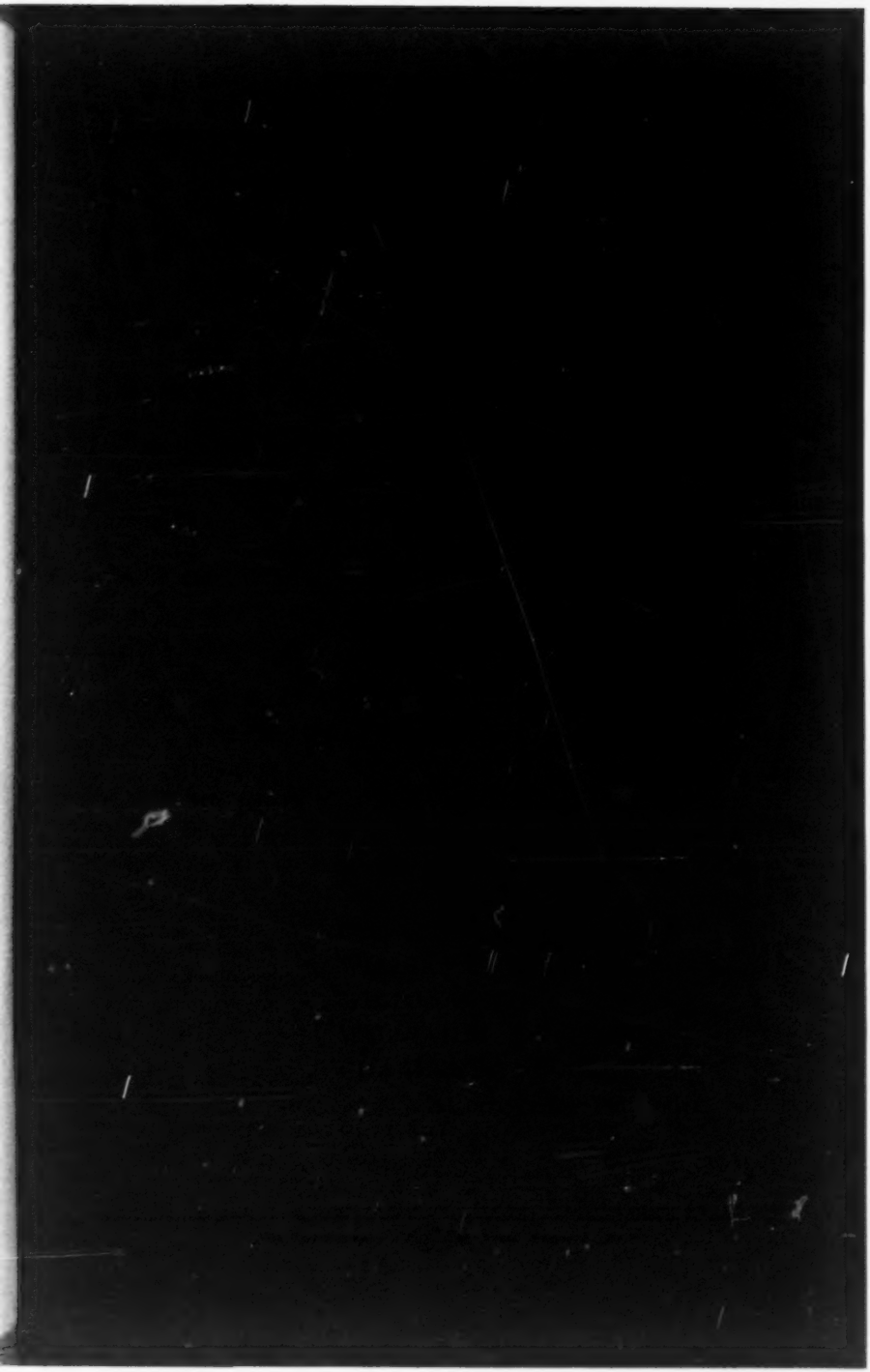
In testimony whereof, I hereunto subscribe my name and affix th
seal of the United States Circuit Court of Appeals for the Eighth Ci
cuit, at office in St. Louis, Missouri, this twenty-fourth day of Apri
A. D. 1913.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.

[Endorsed:] File No. 23,585. Supreme Court of the Unite
States. No. 1010, October Term, 1912. The Board of County Com
missioners of the City and County of Denver vs. The Home Saving
Bank. Writ of Certiorari. Filed Apr. 24, 1913. John D. Jordan
Clerk.

97 & 98 [Endorsed:] File No. 23,585. Supreme Court U. S
October Term, 1912. Term No. 1010. The Board
County Commissioners of the City and County of Denver, Petitioner
vs. The Home Savings Bank. Writ of Certiorari and Return
Filed April 26, 1913.



United States Circuit Court of Appeals
EIGHTH CIRCUIT

No. 3526.

BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, PLAINTIFF IN ERROR,

v.

THE HOME SAVINGS BANK, DEFENDANT IN ERROR.

NOTICE.

The defendant in error is hereby notified that the plaintiff in error will on MONDAY, the 17th day of March, A. D. 1913, upon its verified petition, and a copy of the entire record in this cause, at the opening of the court on that day, or as soon thereafter as counsel can be heard, submit a motion, a copy of which, and a petition for certiorari and brief in support thereof, are hereby delivered to you, to the Supreme Court of the United States, in its court-room in the Capitol, in the city of Washington, D. C.

CHARLES S. THOMAS,
WILLIAM H. BRYANT,
MILTON SMITH,
WILLIAM H. FERGUSON,
CHARLES R. BROCK,
Attorneys for Plaintiff in Error.

The foregoing notice is hereby accepted, and delivery of a copy thereof and of the petition for writ of certiorari and brief in support of the petition, are hereby acknowledged. Dated February 19, 1913.

CHARLES W. WATERMAN,
Attorney for Defendant in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, PETITIONER,

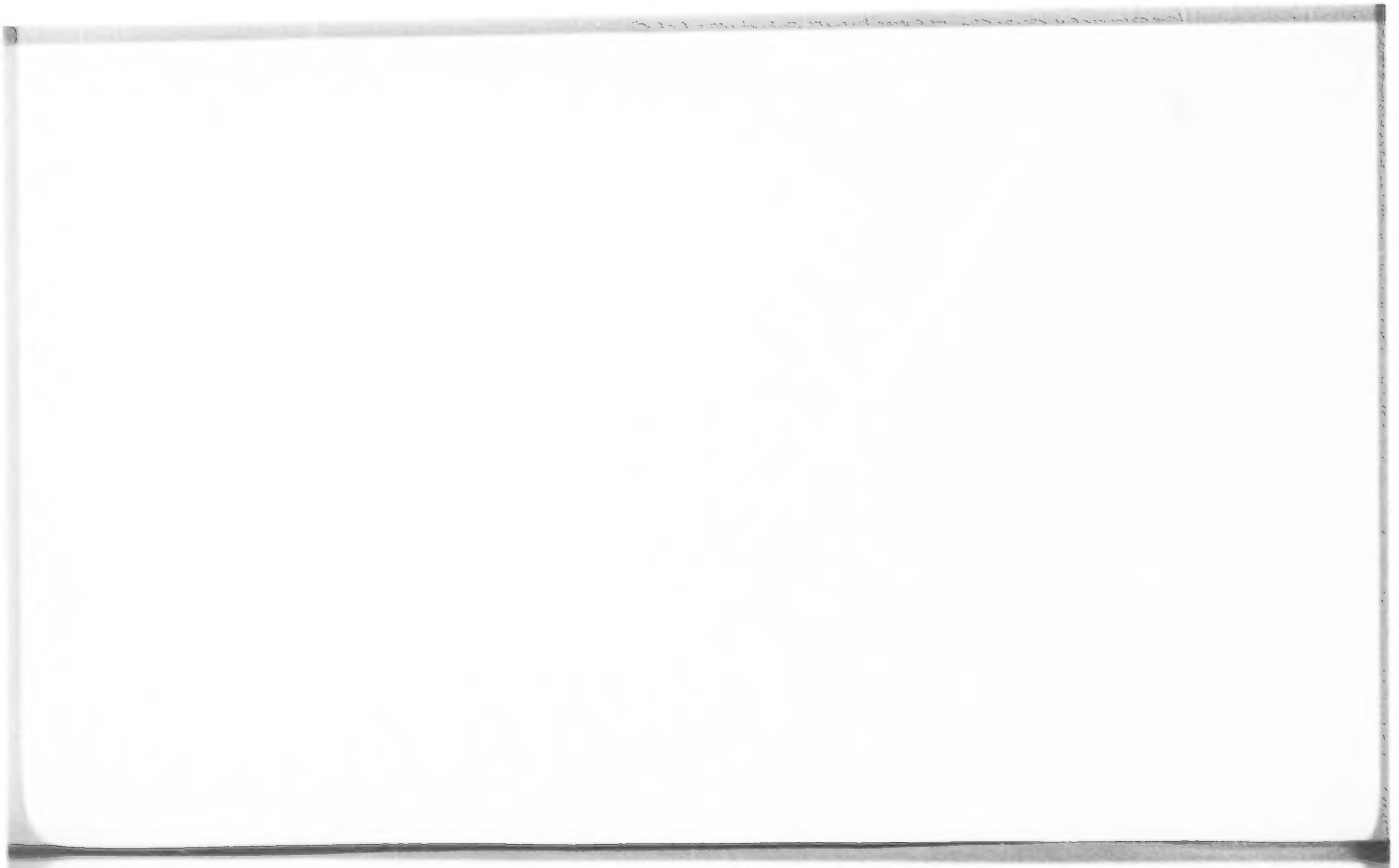
v.

THE HOME SAVINGS BANK, RESPONDENT.

MOTION.

COMES NOW the Board of County Commissioners of the City and County of Denver, by Charles S. Thomas, William H. Bryant, Milton Smith, William H. Ferguson, and Charles R. Brock, its counsel, and moves this honorable court that it shall by certiorari or other process, directed to the honorable judges of the United States Circuit Court of Appeals of the Eighth Circuit, require said court to certify to this court for review and determination a certain cause in said Court of Appeals lately pending, wherein the respondent was defendant in error and your petitioner was plaintiff in error, and to that end it now tenders herewith its petition and brief, with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

CHARLES S. THOMAS,
WILLIAM H. BRYANT,
MILTON SMITH,
WILLIAM H. FERGUSON,
CHARLES R. BROCK,
Attorneys for Petitioner.



In the Supreme Court of the United States.

OCTOBER TERM, 1912.

BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, PETITIONER,

v.

THE HOME SAVINGS BANK, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, the Board of County Commissioners of the City and County of Denver, respectfully represents:

That this action was brought in the Circuit Court of the United States for the District of Colorado by the respondent, The Home Savings Bank, a corporation organized under the laws of the State of Michigan, to recover from the petitioner, a corporation organized under the laws of the State of Colorado, upon a certificate of indebtedness in the principal sum of eleven thousand two hundred and fifty ($11,250.00) dollars, which said certificate of indebtedness is in words and figures as follows, to-wit:

"$11,250 No. 1

CERTIFICATE OF INDEBTEDNESS

City and County of Denver, State of Colorado.

The Federal Ballot Machine Company having presented its claim for furnishing ballot machines against the city and county of Denver in the sum of eleven thousand two hundred and fifty dollars, and the same having been allowed at a regular meeting of the board of county commissioners of the city and county of Denver, state of Colorado, on the 17th day of February, 1908, and the board of county commissioners being authorized thereto by the laws of the state of Colorado, act of 1905, hereby issues its certificate of indebtedness for the said sum, and will in one (1) year pay to the order of the Federal Ballot Machine Company the sum of eleven thousand two hundred and fifty dollars, with interest on this sum from the date hereof at the rate of five per cent. per annum; the said interest payable semi-annually, as per two (2) coupons hereto attached. Interest and principal payable at the office of the county treasurer of the city and county of Denver, Colorado. This certificate is one of a series of ten issued in like sum, payable annually.

Signed by the board of county commissioners of the city and county of Denver, state of Colorado, by its chairman, and attested by the county clerk and recorder, with

the seal of the county authorized thereto by resolution of the 20th day of February, 1908.

Denver, Colorado, February 20, 1908.

BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER,

By S. D. C. HAYS, Chairman.

Attest:

(Seal) ALBION K. VICKERY,
County Clerk and Recorder of the City and County of Denver, Colorado."

This certificate was endorsed by the Federal Ballot Machine Company to the respondent, The Home Savings Bank, and the jurisdiction of the Circuit Court was invoked upon the ground of diversity of citizenship.

In the complaint said certificate was characterized as negotiable, and it was alleged that the certificate was presented for payment; that payment was refused, and that it was thereupon protested for nonpayment, and that plaintiff paid protest fees in the amount of seven dollars and fifty cents.

The petitioner interposed a motion to strike from the complaint the word "negotiable," together with all allegations made with respect to the protest and protest fees, upon the ground that the word "negotiable" was but the expression of an erroneous legal conclusion, and that it appeared from the face of the complaint that the instrument sued on was not negotiable, and could not therefore be legally protested. This motion was denied.

Subsequently an amended answer, containing three defenses, was filed. The first defense placed certain material allegations of the complaint in issue. The second defense set up facts showing a failure of consideration, coupled with allegations showing that the plaintiff was not a holder of the certificate in due course. The third defense merely alleged facts which established an absolute failure of consideration.

A demurrer was interposed by the plaintiff to each of these defenses. It was overruled as to the first and second defenses, but sustained as to the third. To the action of the court in sustaining the demurrer to the third defense, the defendant saved no exception, and, of course, preserved no bill of exceptions in respect to the ruling of the court upon said demurrer. The third defense was sufficient in law, solely and only upon the theory that the certificate was not negotiable. As to whether the certificate was negotiable depended solely and exclusively upon the question of the power and authority of the Board of County Commissioners to issue a negotiable certificate of indebtedness under the laws of the State of Colorado. If the law gave them the power to issue a negotiable certificate of indebtedness, the third defense was not sufficient in law. On the other hand, if, under the law, the Board of County Commissioners had no authority to issue a negotiable certificate of indebtedness, the third defense was sufficient in law. In other words, the third defense, and the demurrer thereto, raised definitely and certainly the same issue of law which petitioner previously sought to raise by a motion to strike the portions of the complaint above mentioned.

In sustaining the demurrer to the third defense, the trial court held that the Board of County Com-

missioners had authority to issue a negotiable certificate of indebtedness, and that the certificate in question was of that character.

The plaintiff filed a replication to the second defense, and a trial was had upon the issues of fact thus formed. The allegations of the complaint which the first defense put in issue were sufficiently established at the trial, and the evidence certainly conduced to establish that the plaintiff was a holder of the certificate of indebtedness in due course. A judgment was accordingly entered for the amount claimed by the complaint.

For the purpose of procuring a review of the action of the trial court in sustaining the demurrer to the third defense, a writ of error in due time was sued out from the United States Circuit Court of Appeals of the Eighth Circuit. Among the errors specifically assigned was the following:

> "The court erred in sustaining the demurrers of the plaintiff to the third defense contained in both the original and amended answer."

Other assignments of error were attempted to be directed to the same question.

The case was argued upon the assignment of error above set forth, in the Circuit Court of Appeals, on the 25th day of September, 1911, and taken under advisement.

On the 24th day of August, 1912, the judgment of the Circuit Court was affirmed by the Court of Appeals, as directed by an opinion which refused to consider or pass upon the sufficiency of the third defense

of the answer, for the sole and only reason that there had been no exception taken to the ruling of the trial court in sustaining the demurrer thereto. Believing that this ruling of the Circuit Court of appeals was purely the result of an inadvertence, a petition for a rehearing was promptly filed. Attention was called by said petition to the fact that the demurrer to the third defense raised an issue of law, which was apparent upon the face of the record; that the ruling of the court thereon was subject to review upon writ of error, without any exception having been taken, and without any bill of exceptions; and that to require an exception to such ruling was an innovation hitherto unknown to the federal courts, the hitherto prevailing practice in the Circuit Court of Appeals, and in direct conflict with numerous express decisions of the Supreme Court of the United States.

In support of the petition for rehearing, attention was also called to the fact that no rule of the Circuit Court of Appeals or of the United States Supreme Court has ever been established or promulgated requiring an exception to be taken to the ruling of the trial court upon a demurrer to a pleading, as a condition precedent to the right of the Circuit Court of Appeals or the Supreme Court of the United States to review such ruling upon writ of error; that no statute had been passed by the Congress of the United States upon the question; that the Supreme Court of the United States, and many of the inferior federal courts, had declared, in the absence of such act of Congress or rule of court, that we are remitted to the common law as our guide for the proper procedure, and that under the common-law rule it had

been the practice from time immemorial—indeed, from the earliest history of the writ of error, long antedating the statutory origin of a bill of exceptions—for appellate courts upon writ of error to review the ruling of the trial court upon a demurrer to a pleading, without an exception or bill of exceptions, for the reason that such ruling was apparent upon the face of the record.

It was thus shown that the exception, which can only become a part of the record through means of a bill of exceptions, is wholly foreign to those matters which constitute a part of the record proper, and in respect of which no change whatever has been wrought by statutes which have provided the means, through a bill of exceptions, of gathering up extraneous matter, and constituting it a part of the record.

On the 6th day of December, 1912, the petition for a rehearing was denied.

Your petitioner therefore believes that the aforesaid judgment of the Circuit Court of Appeals is erroneous, and establishes a rule directly in conflict with that which otherwise uniformly prevails in the Circuit Courts of Appeals, and which has uniformly been announced by the Supreme Court of the United States; and this honorable court, in the interest of a uniform practice, upon a question possibly involved in every common-law action, and with respect to which there should be but one rule, should require the said case to be certified to it for its review and determination, in conformity with the provisions of the act of Congress in such cases made and provided.

Your petitioner has no right of appeal to or writ of error from this court, for the reason that the juris-

diction of the Circuit Court depended entirely on diverse citizenship.

Your petitioner presents herewith as a part of this petition a brief showing more fully its views upon the question involved, and a duly certified transcript of the record of the Circuit Court of Appeals, and also ten (10) printed copies of said record.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said court to certify and send to this court on a day certain, to be therein designated, a full and complete transcript of all records of the Circuit Court of Appeals in this case, which is No. 3526 on the docket of said court, and which was entitled in that court, "*The Board of County Commissioners of the City and County of Denver,* Plaintiff in Error, v. *The Home Savings Bank,* Defendant in Error," to the end that said cause may be reviewed and determined by this court, as provided by law; and that your petitioner may have such other and further relief or remedy in the premises as to this court may seem proper, and that the said judgment of the Circuit Court of Appeals may be reversed by this honorable court.

BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER,

By CHARLES S. THOMAS,
WILLIAM H. BRYANT,
MILTON SMITH,
WILLIAM H. FERGUSON,
CHARLES R. BROCK,
Its Attorneys.

State of Colorado, City and County of Denver, ss.

CHARLES R. BROCK, being first duly sworn, upon oath says that he is one of the counsel for the Board of County Commissioners of the City and County of Denver, the petitioner; that he prepared the foregoing petition, and that the allegations therein are true, as he verily believes.

CHARLES R. BROCK.

Subscribed and sworn to before me this 18th day of February, A. D. 1913.

My commission expires November 13, 1915.

MAY STEWART,
Notary Public in and for the City and County of Denver, State of Colorado.

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, PETITIONER,

v.

THE HOME SAVINGS BANK, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

WITHOUT THE AUTHORITY OF AN ACT OF CONGRESS, WITHOUT ANY RULE OF COURT TO THAT EFFECT, IN VIOLATION OF THE COMMON-LAW RULE WHICH HAS PREVAILED FROM THE EARLIEST HISTORY OF THE WRIT OF ERROR, IN VIOLATION OF THE HITHERTO UNIFORM PRACTICE OF THE CIRCUIT COURTS OF APPEALS OF THE UNITED STATES, AND IN VIOLATION OF THE RULE LONG AGO ANNOUNCED, REITERATED AND CONSISTENTLY FOLLOWED BY THE SUPREME COURT OF THE UNITED STATES, THE CIRCUIT COURT OF APPEALS OF THE EIGHTH CIRCUIT IN THIS CASE HAS DECLARED

THAT, IN THE ABSENCE OF AN EXCEPTION, PROPERLY RESERVED, THE COURT OF APPEALS MAY NOT REVIEW THE RULING OF THE TRIAL COURT UPON A GENERAL DEMURRER TO A PLEADING.

As a result of the rule thus announced, the Court of Appeals declined to review the ruling of the lower court in sustaining a demurrer to the third defense of petitioner's answer.

It is primarily because of this ruling that the petition for a writ of certiorari has been presented. It is, of course, important to our client that the merits of its defense should be adjudicated. It is of infinitely greater importance that it shall not be possible, during the course of litigation, for a rule of procedure, which has prevailed for ages, and upon which members of the profession everywhere have relied, to be abrogated or ignored in such a way as to preclude adjudication upon a question presented and urged in conformity with what has hitherto been the uniform and prevailing practice.

At a time when the joint efforts of bench and bar are about to culminate in simplying and facilitating the preparation and trial of suits in equity, a decision has been made in this case which, if permitted to stand, will greatly complicate the prosecution of actions at law. Hitherto the profession has understood that exceptions are necessary to a review of those rulings of the court which do not constitute a part of the record proper. It has been understood that a bill of exceptions is the means of bringing into the record such rulings and the extraneous matters with respect to which the rulings complained of

were made. Every lawyer of fair experience appreciates this situation, and understands that following the conclusion of the trial a bill of exceptions must be prepared, incorporating those exceptions reserved in the course of the trial, as the basis for review by the appellate court. On the other hand, it has been equally understood that no exception is necessary, and, of course, no bill of exception proper, in respect of the rulings of the trial court upon matters which constitute a part of the record proper. The ruling now complained of has thrown the profession into a state of confusion and uncertainty. If it be true that an exception must be taken to a ruling upon a demurrer, in order to have that ruling reviewed upon writ of error, the question arises as to when such an exception must be preserved by bill of exceptions. To a pleading a demurrer is interposed, and sustained or overruled, at one term of court. The case is tried at the next term, or at some succeeding term. Must the exception, reserved to the ruling upon the demurrer, be preserved by bill of exceptions, prepared and signed within the term at which the ruling is made, or may the exception to the ruling upon the demurrer be incorporated in the general bill of exceptions prepared at the conclusion of the trial?

These are some of the questions confronting the profession, in view of the decision of which we complain. In addition, the burdens of the profession are increased, in that counsel must now reserve exceptions, where none was required before, and incorporate into a bill of exceptions matters which are already a part of the record, thus unnecessarily encumbering the record with a duplicate of precisely the same thing.

There is no court of appeals in the land which has to its credit a greater number of sound and lucid decisions upon the adjective law of the federal courts than has the United States Circuit Court of Appeals of the Eighth Circuit. When that court therefore fails to differentiate between matters constituting a part of the record proper and matters which become a part of the record only by means of a bill of exceptions, we apprehend that the resulting error will be charged to some omission or dereliction on the part of counsel of record in the cause. It is obvious, therefore, that our full duty will not be performed until we have made every possible effort to procure a correction of the error resulting from a failure of the court to discriminate between matters which are fundamentally different.

In support of this new doctrine the Court of Appeals has cited the following cases:

Railway Co. v. Heck, 102 U. S., 120.

Newport News etc. Ry. Co. v. Pace, 138 U. S., 36.

Potter v. United States, 122 Fed., 49.

Of these three cases, two of them involved assignments of error based upon alleged errors in the admission of testimony, but to which no exception had been taken. The other case involved an assignment of error based upon an alleged erroneous charge to the jury, but with respect to which no exception had been taken. All three of the cases thus dealt exclusively with matters which did not constitute a part of the record proper. They dealt with matters which could only become a part of the record by means

of a bill of exceptions. As to all such matters, it has been the rule from the time that a statutory provision for a bill of exceptions was first enacted, that an exception is necessary. Of course, where an exception is necessary, a bill of exceptions is also necessary. Otherwise the exception would not appear in the record.

Embraced within the rule just stated are exceptions to the admission or rejection of evidence, or with respect to charges made or refused to be made to a jury. Indeed, the rule embraces all of those matters which, in the ordinary course of a trial, result in an exception or objection. The same rule was long since announced with respect to motions. This is because motions, though sometimes reduced to writing, are in theory oral, and constitute no part of the pleadings proper.

It is, however, unnecessary to attempt to catalogue the different questions which may possibly arise in the course of litigation, affecting the substantial rights of the parties, and which do not appear upon the face of the record. In order to have any ruling upon such matters reviewed by the appellate court, it is necessary for an exception to the ruling to be reserved at the time, and subsequently duly incorporated into a bill of exceptions.

The theory upon which this rule proceeds is that, such matters being wholly without the record, and the ruling thereon being itself without the record, the ruling of the court will be deemed waived, unless by an exception the court is sharply and positively apprised of a purpose to incorporate the ruling into a bill of exceptions, and by this means to make it a

part of the record, and thus render the ruling a subject of review by a higher court.

Webb v. National Bank of Republic of Chicago, 146 Fed., 717.

It will be noted, as above suggested, that the exception and the bill of exceptions necessarily go hand in hand. The former would avail nothing without the latter. The office of the bill of exceptions is to preserve the exception and bring it into the record. No exception ever became a part of the record otherwise than by means of a bill of exceptions. If an exception is necessary, it results that a bill of exceptions is also necessary. It is absurd to speak of the former in connection with the writ of error, apart from the latter. But for the latter, the appellate court could not know that the former ever existed.

As said by Mr. Justice Gray, in Hanna v. Maas, 122 U. S., 24:

> "The object of a bill of exceptions is to put on record rulings and instructions in matter of law which could not otherwise be a subject of revision in a court of error. The excepting party, in order to entitle himself to such revision, must not only allege exceptions at the trial or hearing, but he must afterwards draw up and hand to the presiding judge those exceptions in writing, stating distinctly and specifically the rulings or instructions of which he complains."

The pleadings, including demurrers and rulings thereon, from time immemorial have constituted a part of the record proper. Any error committed by the

trial court in ruling upon a demurrer to a pleading is and always has been apparent on the record, and consequently subject to review upon writ of error.

There is no act of Congress upon the question under consideration, nor is there any written rule of court thereon. This court, as well as the inferior federal courts, has uniformly held that the practice pertaining to the prosecution of writs of error in the federal court, and the steps to be taken in order to have a federal appellate court review any action of the trial court, are not controlled by the state practice, nor are they comprehended within that statute of the United States adopting, as far as may be, the practice of the state courts in the trial of common-law actions in the federal courts.

Chateaugay Ore & Iron Co., Petitioner, 128 U. S., 544.

Knight v. Illinois Central R. Co., 180 Fed., 368.

Ghost v. United States, 168 Fed., 841.

Francisco v. Chicago & A. R. Co., 149 Fed., 354.

City of Manning v. German Insurance Co., 107 Fed., 52.

Tullis v. Lake Erie & W. R. Co., 105 Fed., 554.

Consumers Cotton Oil Co. v. Ashburn, 81 Fed., 331.

Lowry v. Mt. Adams & Eden Incline etc. R. Co., 68 Fed., 627.

Preble v. Bates, 40 Fed., 745.

Doty v. Jewett, 19 Fed., 337.

These cases conclusively establish that, in the absence of an act of Congress or rule of court on the subject, the practice of the federal appellate courts is derived solely and exclusively from the common law and ancient English statutes.

Section 953 of the Revised Statutes of the United States regulates in some measure the authentication of the bill of exceptions, but does not purport to change the common-law rule as to what constitutes a part of the record proper, or as to what becomes a part of the record only through the aid of a bill of exceptions. Rule 4 of this court and Rule 10 of the United States Circuit Court of Appeals impose certain restrictions in respect to the matters to be incorporated into a bill of exceptions; but neither of these rules even remotely suggest that there shall be incorporated into a bill of exceptions any matter which already constitutes a part of the record. The necessary inference from the language used is absolutely to the contrary.

It results, therefore, that both the statutes of the United States and the written rules of the federal appellate courts are silent, as they have always been, upon the question under consideration. Many rules exist, however, without having been reduced to written form. Hopkins, in his New Federal Equity Rules, at page 10, says:

> "Rules of court may be defined to be the standing regulations of its practice, which have been adopted by the court itself, or prescribed for it by higher judicial or leg-

> islative authority. They may not be written; indeed, there is much unwritten practice known to every court. 'It is not necessary,' said Mr. Justice Blatchford, when district judge, 'that a practice of a court to be recognized or sustained should be embodied in a written rule. Written rules are undoubtedly preferable, but a practice in respect to a particular matter in a court may be established without the existence of a positive written rule.' "

It results that the federal courts have ever been remitted to the common law for guidance as to what matters were subject to review upon writs of error without a bill of exceptions.

It remains to be shown that an unwritten rule of this court—binding, we respectfully submit, upon all of the federal appellate courts—long ago declared that the ruling of the trial court, in sustaining or overruling a demurrer to a pleading, is subject to review upon error in this court, without a bill of exceptions. This rule is embodied in numerous positive decisions of this court. After citing some of these authorities, we shall show that the rule so announced absolutely conforms to that rule which prevailed at common law, both before and subsequent to the first English statute which provided for a bill of exceptions.

In Rogers v. City of Burlington, 3 Wallace, 654, it appears that to the ruling upon demurrers, exceptions were interposed, and preserved by bill of exceptions. The court held this to be useless and unnecessary, using the following language:

"Plaintiff excepted to both those rulings and a bill of exceptions to that effect, in due form, is exhibited in the record; but it is unnecessary further to advert to it, as it is well settled that the ruling of the circuit court, in sustaining or overruling a demurrer to a declaration, and rendering judgment for the wrong party, may be re-examined in this court by a writ of error without any formal bill of exceptions. Gorman v. Lenox, 15 Pet. 115; Suydam v. Williamson, 20 How. 436. Reason for the rule is, that the error is apparent on the record; and it is generally true that where the error is apparent on the face of the record a bill of exceptions is unnecessary."

In City of Aurora v. West, 7 Wallace, 82, the court used the following language:

"Irrespective, therefore, of the bill of exceptions, the writ of error brings here for review the decisions of the court below in overruling the demurrer of the defendants to the tenth replication of the plaintiffs, and in sustaining the demurrer of the plaintiffs to the rejoinder of the defendants as filed to the first, second, fifth, sixth and eighth replications of the plaintiffs. Such being the state of the case, the decision of the court below may be re-examined in this court without any bill of exceptions, as the questions are apparent in the record, and arise upon demurrers to material pleadings on which the cause depends."

In Suydam v. Williamson, 20 How., 427, the court discusses the method of making exhibits a part of the record, and then declares:

> "The effect of the proceeding in certain cases, is to make the instrument a part of the pleadings, and, consequently, to place it within the operation of a writ of error, which, in every case where the proceeding is according to the course of the common law, brings up the whole record; and in all these cases, as well as in the one first named, it is because the evidence, whatever it may be, is made a part of the record by the proceeding, that the questions of law arising upon it become a proper subject of revision on the writ of error. 1 Chit. on Plead., 10th Am. ed., 431; 1 Tidd's Prac., 3d Am. ed., 586. And the same effect is produced and the same object is attained when the defendant demurs to the declaration, or when either party demurs to a material portion of the pleadings on which the cause depends; and so it must have been understood by this court in Gorman v. Lennox, 15 Pet. 115, where it was held, in accordance with the principle here advanced, that the action of the circuit court of this district, in sustaining a demurrer to a plea of performance in a suit on a replevin bond, was the subject of revision on a writ of error; and the rule adopted in that case was undoubtedly correct, as the effect of the demurrer was to make the error apparent in the record; and

> when that is so, it becomes the subject of revision just as much as when it is made to appear by a bill of exceptions or a special verdict."

In Clune v. United States, 159 U. S., 590, Mr. Justice Brewer, speaking for the court, said:

> "An appellate court considers only such matters as appear in the record. From time immemorial that has been held to include the pleadings, process, the verdict and the judgment, and such other matters as by some statutory or recognized method have been made a part of it."

These decisions are declaratory of the common law. At common law, the ruling of the court upon a demurrer to a pleading has always been a proper subject of review upon error by the appellate court. This was true before a bill of exceptions was known. It was true when the higher court had no power to consider upon writ of error anything at all except those matters which appeared upon the face of the record. Prior to the enactment of the first statute providing for a bill of exceptions, the only court which had the power to consider any external question of *fact* was the trial court itself. This was by writ of error *coram nobis* or *coram vobis*.

> Pickett's Heirs v. Legerwood, 7 Pet., 144.
>
> Stephen on Pleading, Tyler's edition, p. 142.

In other words, if any question of *fact* was to be considered upon a writ of error, that could only be

done under the writ of error *coram nobis*. This writ of error, like the writ of error proper, was sued out of chancery, commanding the judges of the trial court themselves to examine the record, and this the trial court had the power to do, in the light of the external facts which were produced in connection with such review. The end accomplished by the writ of error *coram nobis*, anciently, has been accomplished in modern times by a motion, supported by affidavits. The writ of error proper, however, though issued in the same way, commanded the judges to send the record to the court of appellate jurisdiction, and the appellate court was able to review every question of law which appeared on the face of the record, but was unable to consider any question of fact whatever.

This condition continued until the time of the reign of Edward I. In his reign the statute of Westminster 2, 13 Edw. I., c. 31, was enacted, and thereby provision was made for questions of fact and the rulings of the court thereon, which were presented and made in the course of the trial, to be incorporated into a bill of exceptions. This bill of exceptions the trial judge was required to seal. Thus the facts and decisions thereon, which were embraced within the bill of exceptions, were made to become a part of the record, and the rulings set forth therein became subject to review upon writ of error by the appellate court, just as it had always reviewed the questions of law arising upon the face of the record.

The bill of exceptions, therefore, in its origin and purpose, when properly prepared, embraced matters which were exclusively *dehors* the record. It in no respect changed the law as to what was already in the

record. With such matters the bill of exceptions had no connection whatever. Those matters, prior to the statute of Westminster, had always been subject to review upon writ of error. They continued to be subject to review in the same way. The single and sole purpose of the bill of exceptions was to put extraneous matters presented or occurring at the trial upon the record, in order that issues of law arising thereon might also be considered by the appellate court.

In Coke upon Littleton, Volume 1, in a note to section 155 b, it is said:

> "And, as a check to the judge in the discharge of this duty, either party may, under the statute of Westminster 2, c. 31, make his exception in writing to the judge's direction, and enforce its being made a part of the record, so as afterwards to found error upon it."

Stephen on Pleading, Tyler's edition, at page 142, says:

> "When a writ of error is obtained, the whole proceedings to final judgment inclusive, are then always actually *entered* (if this has not before been done) on record, and the object of the writ of error is to reverse the judgment for some *error of fact or law* that is supposed to exist in the proceedings *as so recorded.*"

The author then proceeds to show that if it be an error of fact, the review can only be had by the writ of error *coram nobis*, and continues:

"But the most frequent case of error is when, upon the face of the record, the judges appear to have committed a mistake *in law*. This may be by having *wrongly decided an issue in law* brought before them by demurrer, but it may also happen in other ways. As formerly stated, the judgment will in general follow success in the issue. It is, however, a principle necessary to be understood, in order to have a right apprehension of the nature of writs of error, that the judges are, in contemplation of law, bound, before in any case they give judgment, to *examine the whole record*, and then to adjudge either for the plaintiff or defendant, according to the legal right as it may on the whole appear, notwithstanding, or without regard to, the issue in law or fact that may have been raised and decided between the parties; and this, because the pleader may, from misapprehension, have passed by a material question of law without taking issue upon it. Therefore, whenever, *upon examination of the whole record*, right appears on the whole not to have been done, and *judgment appears to have been given for one of the parties, when it should have been given for the other*, this will be an *error in law*. And it will be equally error, whether the question was raised on *demurrer*. * * * But * * * nothing will be error in law that does not appear *on the face of the record;* for matters not so appearing are not

supposed to have entered into the consideration of the judges. Upon error in *law*, the remedy is not by writ of error *coram nobis* (for that would be merely to make the same judges reconsider their own judgment), but by a writ of error, requiring the record to be sent into some other court of appellate jurisdiction, that the error may be there corrected, and called a writ of error generally."

Blackstone, in his Commentaries, Volume 3; at page 372, gives the following account and purpose of the above-mentioned statute:

"The oath administered to the witness is not only that what he deposes shall be true, but that he shall also depose the *whole* truth: so that he is not to conceal any part of what he knows, whether interrogated particularly to that point or not. And all this evidence is to be given in open court, in the presence of the parties, their attorneys, the counsel, and all bystanders, and before the judge and jury; each party having liberty to except to its competency, which exceptions are publicly stated and by the judge are openly and publicly allowed or disallowed, in the face of the country: which must curb any secret bias or partiality that might arise in his own breast. And if, either in his directions or decisions, he misstates the law by ignorance, inadvertence or design, the counsel on either side may require him publicly to seal a *bill of exceptions;* stating the point wherein he is

supposed to err: and this he is obliged to seal by statute Westm. 2, 13 Edw. I, c. 31, or, if he refuses so to do, the party may have a compulsory writ against him, commanding him to seal it, if the fact alleged be truly stated: and if he returns, that the fact is untruly stated, when the case is otherwise, an action will lie against him for making a false return. This bill of exceptions is in the nature of an appeal; examinable, not in the court out of which the record issues for the trial at *nisi prius*, but in the next immediate superior court, upon a writ of error, after judgment given in the court below."

In Encyclopaedia of Pleading and Practice, Volume 3, at page 378, it is said:

"Prior to the statute of Westminster (13 Ed. I, c. 31), the only errors reviewable at common law on a writ of error were those apparent on the face of the record proper. The record proper consisted of the pleadings, process, verdict and judgment. Exceptions to rulings of the court during the progress of the trial were not brought up, as the oral or parol matters on which they were based were not incorporated in the record. The bill of exceptions being, accordingly, purely a creation of statute and unknown to the common law, it cannot be extended to cases not within the contemplation of the statute. The statute of Westminster was applicable only to civil cases sued in courts following the common law."

At page 404 of the same volume it is said:

> "It is a general rule of appellate procedure that a bill of exceptions is useless, and indeed none should be brought up to the appellate court, where all the facts constituting the alleged error appear on the face of the record proper. The reason for this rule is obvious, since the only purpose of the bill is to bring before the court in an authenticated manner facts which in the ordinary course of proceeding would not otherwise appear of record in the case."

We ask permission to cite from the Supreme Court of Florida an interesting discussion of the question, in the case of Barnes v. Scott, 11 Southern Reporter, page 48, where the court says:

> "While the rule is well settled that exceptions must be taken and noted to all rulings of the court below that it is desired to have reviewed here, when such rulings are made during the progress of a trial concerning matters *in pais*, that are not and can never be a part of the record in the case, unless made so by bill of exceptions duly made up and authenticated by the signature and seal of the judge presiding, yet this rule, upon a writ of error, does not apply to rulings that are apparent upon the face of the record, and that are, per force of their very nature, a part of the record itself, and that appear from a simple transcript of the papers and proceedings that compose the record proper

of the cause, without the help or addition of a bill of exceptions—such, for instance, as the rulings of the court upon demurrers to the different pleadings. When the matter submitted to the court for its decision, and the ruling thereon, is made to appear as a part of the legitimate record proceedings in the cause, leading up as steps to the formation of the issues therein, then as to such matters there is no necessity for any exception in order to have it reviewed here, because in such cases a bare transcript of the papers filed in the cause, and that compose within themselves that which is the record of such cause, and the rulings of the court thereon, would upon their face exhibit the matter to be reviewed here without the aid of a bill of exceptions to make it appear. The distinction as to when it is and when it is not necessary to take or note exceptions to rulings upon which a review is desired, is thus very clearly put in Pow. App. Proc., p. 215:

"The only object of a bill of exceptions is to bring into the record the facts and the decision of the court, where it would not otherwise appear therein. Sometimes, when a matter transpires or a decision is casually made, and its objectionable character not readily perceived, the party is required to make his objection at the time in order to enable the matter to be corrected, if it is chosen to be, for otherwise it may be presumed that the matter was assented to or

> waived. But where a question is directly raised to the court to respond to it, as upon a demurrer, * * * no bill of exceptions is necessary.' "

We again wish to emphasize the fact that an exception is not to be separated from a bill of exceptions. If the former is necessary, the latter affords the only means of preserving it. It is true that a practice prevails in some states, as we are advised—as, for example, in Kentucky and probably in Wyoming—of appending to a judgment a form of exception; but this is a practice wholly unknown to the common law, and which is of no importance here, except as it may serve to illustrate the danger of the federal courts falling into errors by inadvertently adopting the state practice.

It seems to us that no argument is necessary to show that the practice on the question under discussion should be uniform in all of the courts of the United States. The rule adopted by the Supreme Court should prevail in all of the other federal appellate courts.

Hopkins, in his New Federal Equity Rules, at page 11, well said:

> "The primary object of all rules is to secure uniformity in practice. They relate to the adjective, not to the substantive, law. * * * Every lawyer wishes to comply with the rules of court. The difficulty of learning what the rules, written and unwritten, are, consumes much valuable time, which

> were better devoted to the merits of the controversies in the courts. * * * When the rule is clear, and courts deliberately depart from it, the result is an unfair embarrassment of the bar."

We assume that every conscientious member of the bar stands in more or less dread of the possibility of some omission on his part resulting in the refusal of the court to pass upon the merits of his client's cause of action or defense. No lawyer is held blameless who fails to follow that procedure prescribed by the court, and made a condition precedent to the right to adjudicate the real issues of the controversy. We yield to no one in the sense of responsibility attaching to a lawyer in this respect. In an effort to know the proper practice and procedure upon the question under discussion, we have spared no pains. We have examined into every known source of information on the subject—the statutes of the United States, the rules of this court and of the Court of Appeals, the common law, the decisions of this court, the practice in the Courts of Appeals, and finally the history, including the origin and office, of the bill of exceptions. A careful investigation of these subjects can lead to but one conclusion, and that conclusion this court reached long before the Courts of Appeals were established, and that conclusion became a recognized, though unwritten, rule of procedure in all of the federal courts, without a single exception, so far as we have been able to discover, until the decision in this case.

With respect to a rule of practice which has prevailed from time immemorial, changes may become

necessary. As respects the rule under consideration, we respectfully submit, however, that no reason, based upon principle, convenience, or necessity, can be given for its abrogation. In any event, if a rule of such long duration and uniform recognition is to be abrogated, the new rule, whether made by statute, written or unwritten rule of court, should never be permitted to become retroactive in its operation. The adjective law, no less than the substantive law, if changed during the course of litigation, and made retroactive with respect thereto, proves disastrous to the rights of the litigant, and violates the spirit, if not the letter, of the Constitution of the United States. We urge, however, that there is no reason why any change should be made in the rule under discussion, and we express the hope that the additional burdens necessarily incident to such change, in preparation for reviews upon writs of error, will not be unnecessarily imposed upon the profession.

In the interest of harmony in the practice and procedure in the federal courts, we respectfully urge that the writ of certiorari in this case may be granted, and the rule once more announced by this tribunal in conformity with its previous declarations upon this important subject.

Respectfully submitted,

CHARLES S. THOMAS,
WILLIAM H. BRYANT,
MILTON SMITH,
WILLIAM H. FERGUSON,
CHARLES R. BROCK,
Attorneys for Petitioner.

No. ~~480.~~ 126

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1912.

~~No. 1910.~~

BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, PETITIONER,

v.

THE HOME SAVINGS BANK, RESPONDENT.

BRIEF FOR PETITIONER.

I. N. STEVENS,
MILTON SMITH,
WILLIAM H. FERGUSON,
CHARLES R. BROCK,
Attorneys for Petitioner.

Smith-Brooks [redacted] Press, Denver.

CONTENTS OF BRIEF

CASES CITED

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1912.

No. 1010.

BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, PETITIONER,

v.

THE HOME SAVINGS BANK, RESPONDENT.

BRIEF FOR PETITIONER.

STATEMENT.

This action was brought in the Circuit Court of the United States for the District of Colorado by the respondent, The Home Savings Bank, a corporation organized under the laws of the State of Michigan, to recover from the petitioner, a municipal corporation organized under the laws of the State of Colorado, upon a certificate of indebtedness in the principal sum of $11,250. The certificate of indebtedness

is set out *in haec verba* in the complaint, and is as follows:

"$11,250 No. 1

CERTIFICATE OF INDEBTEDNESS

City and County of Denver, State of Colorado.

The Federal Ballot Machine Company having presented its claim for furnishing ballot machines against the city and county of Denver in the sum of eleven thousand two hundred and fifty dollars, and the same having been allowed at a regular meeting of the board of county commissioners of the city and county of Denver, state of Colorado, on the 17th day of February, 1908, and the board of county commissioners being authorized thereto by the laws of the state of Colorado, act of 1905, hereby issues its certificate of indebtedness for the said sum, and will in one (1) year pay to the order of the Federal Ballot Machine Company the sum of eleven thousand two hundred and fifty dollars, with interest on this sum from the date hereof at the rate of five per cent. per annum; the said interest payable semi-annually, as per two (2) coupons hereto attached. Interest and principal payable at the office of the county treasurer of the city and county of Denver, Colorado. This certificate is one of a series of ten issued in like sum, payable annually.

Signed by the board of county commissioners of the city and county of Denver, state of Colorado, by its chairman, and attested by the county clerk and recorder, with the seal of the county authorized thereto by resolution of the 20th day of February, 1908.

Denver, Colorado, February 20, 1908.

BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER,

By S. D. C. HAYS, Chairman.

Attest:

(Seal) ALBION K. VICKERY,
County Clerk and Recorder
of the City and County of
Denver, Colorado."

A second cause of action was for the recovery of the amount alleged to be due upon one of the interest coupons mentioned in said certificate.

To the complaint an amended answer was filed, containing three separate defenses. The first and second defenses raised questions of fact, which were decided adversely to the plaintiff in the trial court, with the result that the third defense alone is material to the question here to be considered.

The third defense will be found, beginning at page 17 of the Record, and is as follows:

"For a third defense the defendant alleges, that the consideration for the execution of both the certificate of indebtedness

and interest coupon in the complaint mentioned, has wholly failed. That said instruments were executed in part payment for one hundred and fifty voting machines known as the Dean Ballot Machines, under an agreement made and entered into between the Federal Ballot Machine Company and this defendant on the 27th day of May A. D. 1907. That by said agreement the said Federal Ballot Machine Company undertook and guaranteed that each of said machines should conform in every particular to the constitution and statutes of the state of Colorado with respect to the holding of elections by means of said machines, and that they would perfectly and accurately perform the work of voting machines, as required by said laws. That the said machines do not conform in every particular to the requirements of the constitution and statutes of the state of Colorado in respect to the holding of elections by means of voting machines, and do not perfectly or accurately perform the work as required by said constitution and laws, in that in the use of said machines the secrecy of the ballot cannot be preserved; that the mechanism of the said machines is so intricate and complicated that an elector cannot vote at all within the limit of one minute; that it is impossible for an elector by the use of the said machine to vote a straight ticket, mixed ticket, or an irregular ticket, or any of them, within said space of time, and it is utterly impossible for an elector, by the use

of the said machines secretly to vote a split or irregular ticket; that said machines are so constructed that after they have been locked, preparatory for use at an election, they are easily and readily manipulated in such a way as to render possible the placing of fradulent ballots therein; that their construction is such that an elector cannot cast a vote for presidential electors without first divulging the names of the persons for whom he so desires to vote, and the construction of said machines is such that it is impossible for an elector to vote for any particular individual presidential elector; that by the use of said machines it is impossible, where there are as many as seven tickets, for an elector to vote for an independent candidate, and it is also impossible by the use of said machines to vote a straight ticket by a single device. The machines do not prevent a voter from voting for a candidiate or on a question for whom or on which he is not entitled to vote. Said machines do not correctly register every vote attempted to be cast either for candidates or on questions submitted to a vote; that said machines are so constructed that if used at an election said ballots cannot be re-counted in case of contest in manner and form required and contemplated by law, and are without any value whatever."

To this third defense, as well as to the first and second defenses, the respondent interposed a general demurrer upon the ground that neither thereof stated

facts sufficient to constitute a defense to the cause of action set forth in the complaint. This demurrer was overruled as to the first and second defenses, but sustained as to the third.

To the action of the court in sustaining the demurrer to the third defense the defendants saved no exception, and consequently preserved no bill of exceptions in respect to the ruling of the court upon said demurrer. The third defense was sufficient in law solely and only upon the theory that the certificate of indebtedness sued upon was not negotiable. Whether the certificate was negotiable depended solely and exclusively upon the question of the power and authority of the Board of County Commissioners to issue a negotiable certificate of indebtedness under the laws of the State of Colorado. If the law gave said board the power to issue a negotiable certificate of indebtedness, the third defense was not sufficient in law. On the other hand, if, under the law, the Board of County Commissioners had no authority to issue a negotiable certificate of indebtedness, the third defense was sufficient in law. This question was directly and unequivocally raised by the third defense and the demurrer thereto. In sustaining the demurrer to the third defense, the trial court of necessity held that the Board of County Commissioners had authority to issue a negotiable certificate of indebtedness, and that the certificate of indebtedness was in fact of that character.

The plaintiff filed a replication to the second defense, and a trial was had upon the issues of fact thus formed, as well as upon the issue of fact raised by the first defense to the complaint.

The allegations of the complaint which the first defense put in issue were sufficiently established at the trial, and the evidence certainly conduced to establish that the plaintiff was a holder of the certificate of indebtedness in due course. Judgment was accordingly entered for the amount claimed in the complaint.

For the purpose of procuring a review of the action of the trial court in sustaining the demurrer to the third defense, a writ of error in due time was sued out from the United States Circuit Court of Appeals for the Eighth Circuit. Among the errors specifically assigned were the following:

> "4. The court erred in sustaining the demurrers of the plaintiff to the third defense contained in both the original and the amended answer.
>
> 5. The court erred in ruling that the instruments sued on in the complaint were negotiable.
>
> 10. That the judgment is contrary to law."

The case was argued in the Circuit Court of Appeals on the 25th day of September, 1911, and taken under advisement. On the 24th day of August, 1912, the judgment of the Circuit Court was affirmed by the Court of Appeals, as directed by an opinion which refused to consider or pass upon the sufficiency of the third defense of the answer, for the sole and only reason that there had been no exception taken to the ruling of the trial court in sustaining the demurrer thereto. Subsequently, and within due time,

a petition for a rehearing was filed with the Circuit Court of Appeals, and this petition was denied on the 6th day of December, 1912. Thereupon application was made to this court for a writ of *certiorari*, and the writ was granted on March 24, 1913.

SPECIFICATION OF ERRORS.

The assignments of error made in the Court of Appeals, pages 69 and 70 of the Record, which will be urged here, are the following:

> "4. The court erred in sustaining the demurrers of the plaintiff to the third defense contained in both the original and the amended answer.
>
> 5. The court erred in ruling that the instruments sued on in the complaint were negotiable.
>
> 10. That the judgment is contrary to law."

ARGUMENT.

FIRST POINT.

AN EXCEPTION TO THE RULING OF THE TRIAL COURT UPON A DEMURRER TO A PLEADING IS NOT A CONDITION PRECEDENT TO THE RIGHT TO HAVE THAT RULING REVIEWED UPON WRIT OF ERROR, AND SUCH AN EXCEPTION IS UNAUTHORIZED BY ANY RULE WHICH HAS EVER BEEN KNOWN OR RECOGNIZED EITHER AT COMMON LAW OR IN THE FEDERAL COURTS OF THE UNITED STATES.

The merits of this controversy will be discussed under the *Second, Third,* and *Fourth Points.* A question of practice having been so ruled by the Circuit Court of Appeals as to prevent a consideration of the merits of petitioner's third defense, and that question of practice being the sole matter to which attention was directed in the application for a writ of *certiorari* from this court, we assume that it is proper for us *in limine* to address ourselves to that question of practice. Accordingly we present it as the first point of our argument.

In the opinion of the Circuit Court of Appeals, at page 85 of the Record, the following language is used:

> "The authority of defendant's board of commissioners, under the law of Colorado, to issue negotiable certificates of indebted-

ness, or the validity in its inception of the instrument sued upon, was challenged in the circuit court, if at all, only by demurrer to the third defense of the answer. The demurrer to that defense was sustained, upon what ground does not appear, but no exception was saved to the ruling. Admitting, without deciding, that the third defense raised the issue of the want of authority of the board of commissioners to issue the certificate as a negotiable instrument, or the legality of the instrument in its inception, the defendant, if it desired to test the correctness of the ruling sustaining the demurrer, should have excepted thereto at the time. This it did not do."

As a result of the rule thus announced, the Court of Appeals declined to review the ruling of the lower court in sustaining the demurrer to the third defense of petitioner's answer.

We shall easily be able to show that in this ruling an innovation has been created with respect to a question of practice that has been without exception in the entire history of the common law, and which has been equally uniform in all of the courts of the United States.

It is, of course, important to our client that the merits of its defense should be adjudicated. It is of infinitely greater importance that it shall not be possible, during the course of litigation, for a rule of procedure, which has prevailed for ages, and upon which members of the profession everywhere have

relied, to be abrogated or ignored in such a way as to preclude adjudication upon a question presented and urged in conformity with what has hitherto been the uniform and prevailing practice. At a time when the joint efforts of bench and bar have culminated in simplifying and facilitating the preparation and trial of suits in equity, a decision has been made in this case which, if permitted to stand, will greatly complicate the prosecution of actions at law. Hitherto the profession has understood that exceptions are necessary to a review of those rulings of the court which do not constitute a part of the record proper. It has been understood that a bill of exceptions is the means of bringing into the record such rulings and the extraneous matters with respect to which the rulings complained of were made. Every lawyer of fair experience appreciates this situation, and understands that, following the conclusion of the trial, a bill of exceptions must be prepared, incorporating those exceptions reserved in the course of the trial, as the basis for review by the appellate court. On the other hand, it has been equally understood that no exception is necessary, and, of course, no bill of exceptions proper, in respect of the rulings of the trial court upon matters which constitute a part of the record proper. The ruling now complained of, of necessity throws the profession into a state of confusion and uncertainty. If it be true that an exception must be taken to a ruling upon a demurrer in order to have that ruling reviewed upon writ of error, the question arises as to when such an exception must be preserved by bill of exceptions. To a pleading a demurrer is interposed, and sustained or overruled,

at one term of court. The case may be tried at the next term or at some succeeding term. Must the exception, reserved to the ruling upon the demurrer, be preserved by bill of exceptions, prepared and signed within the term at which the ruling is made, or may the exception to the ruling upon the demurrer be incorporated into the general bill of exceptions prepared at the conclusion of the trial?

These are some of the questions confronting the profession in view of the decision of which we complain. In addition, the burdens of the profession are increased in that counsel must reserve exceptions where none was required before, and incorporate into a bill of exceptions matters which are already a part of the record, thus unnecessarily encumbering the record with a duplicate of precisely the same thing.

There is no court of appeals in the land which has to its credit a greater number of sound and lucid decisions upon the adjective law of the federal courts than has the United States Circuit Court of Appeals of the Eighth Circuit. This is a matter of frequent comment on the part of members of the profession. When that court, therefore, fails to differentiate between matters constituting a part of the record proper and matters which become a part of the record only by means of a bill of exceptions, we apprehend that the resulting error will be charged to some omission or dereliction on the part of counsel of record in the cause. It is obvious, therefore, that our full duty will not be performed, either to our client or to the profession at large, until we have made every possible effort to procure a correction of the error resulting from the failure of the court, through inadvertence

or otherwise, to discriminate between matters which are fundamentally different.

In support of this new doctrine the Court of Appeals has cited the following cases:

Railway Co. v. Heck, 102 U. S., 120.

Newport News etc. Ry. Co. v. Pace, 158 U. S., 36.

Potter v. United States, 122 Fed., 49.

Of these three cases, two of them involved assignments of error based upon alleged errors in the admission of testimony, but to which no exception had been taken. The other case involved an assignment of error based upon an alleged erroneous charge to the jury, but with respect to which no exception had been taken. All three of the cases thus dealt exclusively with matters which did not constitute a part of the record proper; they dealt with matters which could only become a part of the record by means of a bill of exceptions. As to all such matters, it has been the rule, from the time that a statutory provision for a bill of exceptions was first enacted, that an exception is necessary. Of course, where an exception is necessary, a bill of exceptions is also necessary—otherwise the exception would not appear in the record.

Embraced within the rule just stated are exceptions to the admission or rejection of evidence, or with respect to charges made or refused to be made to a jury. Indeed, the rule embraces all those matters which in the ordinary course of a trial result in an exception or objection. The same rule was long since announced with respect to motions. This is because motions, though sometimes reduced to writing, are in

theory oral, constitute no part of the pleadings proper, and, therefore, no part of the record.

It is, however, unnecessary, to attempt to catalogue the different questions which may possibly arise in the course of litigation, affecting the substantial rights of the parties, and which do not appear upon the face of the record. In order to have any ruling upon such matters reviewed by the appellate court, it is necessary for an exception to the ruling to be reserved at the time, and subsequently duly incorporated into a bill of exceptions. The theory upon which this rule proceeds is that, such matters being wholly without the record, and the ruling thereon being itself without the record, the ruling of the court will be deemed waived, unless by an exception the court is sharply and positively apprised of a purpose to incorporate the ruling into a bill of exceptions, and by this means to make it a part of the record, and thus render the ruling a subject of review by a higher court.

Webb v. National Bank of Republic of Chicago, 146 Fed., 717.

It will be noted, as above suggested, that the exception and the bill of exceptions necessarily go hand in hand. The former would avail nothing without the latter. The office of the bill of exceptions is to preserve the exception, and to bring it into the record. No exception ever became a part of the record otherwise than by means of the bill of exceptions. If an exception is necessary, it results that a bill of exceptions is also necessary. It is absurd to speak of the former, in connection with the writ of

error, apart from the latter. But for the latter, the appellate court could not know that the former existed.

As said by Mr. Justice Gray in Hanna v. Maas, 122 U. S., 24:

> "The object of a bill of exceptions is to put on record rulings and instructions in matter of law which could not otherwise be a subject of revision in a court of error. The excepting party, in order to entitle himself to such revision, must not only allege exceptions at the trial or hearing, but he must afterwards draw up and hand to the presiding judge those exceptions in writing, stating distinctly and specifically the rulings or instructions of which he complains."

The pleadings, including demurrers and rulings thereon, from time immemorial have constituted a part of the record proper. Any error committed by the trial court in ruling upon a demurrer to a pleading is, and always has been, apparent on the record, and consequently subject to review upon writ of error. There is no act of Congress upon the question under consideration, nor is there any written rule of court thereon. This court, as well as the inferior federal courts, has uniformly held that the practice pertaining to the prosecution of writs of error in the federal court, and the steps to be taken in order to have a federal appellate court review any action of the trial court, are not controlled by the state practice, nor are they comprehended within that statute of the United States adopting, as far as may be, the practice of the

state courts in the trial of common-law actions in the federal courts.

Chateaugay Ore & Iron Co., Petitioner, 128 U. S., 544.

Knight v. Illinois Central R. Co., 180 Fed., 368.

Ghost v. United States, 168 Fed., 841.

Francisco v. Chicago & A. R. Co., 149 Fed., 354.

City of Manning v. German Insurance Co., 107 Fed., 52.

Tullis v. Lake Erie & W. R. Co., 105 Fed., 554.

Consumers Cotton Oil Co. v. Ashburn, 81 Fed., 331.

Lowry v. Mt. Adams & Eden Incline etc. R. Co., 68 Fed., 827.

Preble v. Bates, 40 Fed., 745.

Doty v. Jewett, 19 Fed., 337.

These cases conclusively establish that, in the absence of an act of Congress or rule of court on the subject, the practice of the federal appellate courts is derived solely and exclusively from the common law and ancient English statutes.

Section 953 of the Revised Statutes of the United States regulates in some measure the authentication of the bill of exceptions, but does not purport to change the common-law rule as to what constitutes a part of the record proper, or as to what becomes a part of the record proper only through the aid of a bill of exceptions. Rule 4 of this court and Rule 10 of the

United States Circuit Court of Appeals impose certain restrictions in respect to matters to be incorporated into the bill of exceptions, but neither of these rules even remotely suggests that there shall be incorporated into a bill of exceptions any matter which already constitutes a part of the record. The necessary inference from the language used is absolutely to the contrary. It results, therefore, that both the statutes of the United States and the written rules of the federal appellate courts are silent, as they have always been, upon the question under consideration. Many rules exist, however, without having been reduced to written form. Hopkins, in his New Equity Rules, at page 10, says:

> "Rules of court may be defined to be the standing regulations of its practice, which have been adopted by the court itself, or prescribed for it by higher judicial or legislative authority. They may not be written; indeed, there is much unwritten practice known to every court. 'It is not necessary,' said Mr. Justice Blatchford, when district judge, 'that a practice of a court to be recognized or sustained should be embodied in a written rule. Written rules are undoubtedly preferable, but a practice in respect to a particular matter in a court may be established without the existence of a positive written rule.'"

It results that the federal courts have ever been remitted to the common law for guidance as to what matters were subject to review upon writs of error

without a bill of exceptions. It remains for us to show that an unwritten rule of this court—binding, we respectfully submit, upon all of the federal appellate courts—long ago declared that the ruling of the trial court in sustaining or overruling a demurrer to a pleading is subject to review upon error in this court, without a bill of exceptions. This rule is embodied in numerous positive decisions. After citing some of these authorities, we shall show that the rule so announced absolutely conforms to that rule which prevailed at common law, both subsequent to and before the first English statute which provided for a bill of exceptions.

In Rogers v. City of Burlington, 3 Wallace, 654, it appears that to the ruling upon demurrers exceptions were interposed, and preserved by bill of exceptions. The court held this to be useless and unnecessary, using the following language:

> "Plaintiff excepted to both those rulings and a bill of exceptions to that effect, in due form, is exhibited in the record; but it is unnecessary further to advert to it, as it is well settled that the ruling of the circuit court, in sustaining or overruling a demurrer to a declaration, and rendering judgment for the wrong party, may be re-examined in this court by a writ of error without any formal bill of exceptions. Gorman v. Lenox, 15 Pet. 115; Suydam v. Williamson, 20 How. 436. Reason for the rule is, that the error is apparent on the face of the record; and it is generally true that where the error is ap-

parent on the face of the record a bill of exceptions is unnecessary."

In City of Aurora v. West, 7 Wallace, 82, the court used the following language:

> "Irrespective, therefore, of the bill of exceptions, the writ of error brings here for review the decisions of the court below in overruling the demurrer of the defendants to the tenth replication of the plaintiffs, and in sustaining the demurrer of the plaintiffs to the rejoinder of the defendants as filed to the first, second, fifth, sixth and eighth replications of the plaintiffs. Such being the state of the case, the decision of the court below may be re-examined in this court without any bill of exceptions, as the questions are apparent in the record, and arise upon demurrers to material pleadings on which the cause depends."

In Suydam v. Williamson, 20 How., 427, the court discusses the method of making exhibits a part of the record, and then declares:

> "The effect of the proceeding in certain cases, is to make the instrument a part of the pleadings, and, consequently, to place it within the operation of a writ of error, which, in every case where the proceeding is according to the course of the common law, brings up the whole record; and in all these cases, as well as in the one first named, it is

because the evidence, whatever it may be, is made a part of the record by the proceeding, that the questions of law arising upon it become a proper subject of revision on the writ of error. 1 Chit. on Plead., 10th Am. Ed., 431; 1 Tidd's Prac., 3d Am. Ed., 586. And the same effect is produced and the same object is attained when the defendant demurs to the declaration, or when either party demurs to a material portion of the pleadings on which the cause depends; and so it must have been understood by this court in Gorman v. Lennox, 15 Pet. 115, where it was held, in accordance with the principle here advanced, that the action of the circuit court of this district, in sustaining a demurrer to a plea of performance in a suit on a replevin bond, was the subject of revision on a writ of error; and the rule adopted in that case was undoubtedly correct, as the effect of the demurrer was to make the error apparent in the record; and when that is so, it becomes the subject of revision just as much as when it is made to appear by a bill of exceptions or a special verdict."

In Clune v. United States, 159 U. S., 590, Mr. Justice Brewer, speaking for the court, said:

"An appellate court considers only such matters as appear in the record. From time immemorial that has been held to include the pleadings, process, the verdict and the judgment, and such other matters as by some

statutory or recognized method have been made a part of it."

Recently the Circuit Court of Appeals of the Ninth Circuit, in the case of Mitsui v. St. Paul Fire and Marine Insurance Co., 202 Fed., 26, had this question under consideration, and at page 28 used the following language:

"From an inspection of the bill of exceptions it is at once manifest that no objections or exceptions were saved, and hence no questions of law arising at the trial can now be presented to or considered by this court. But this is no obstacle to the court's considering such questions as may arise upon the record and which it is not the office of the bill of exceptions to present.

The action of the court in overruling or sustaining a demurrer to the complaint is a matter which appears by the record, and no bill of exceptions is necessary for saving the questions pertaining thereto for the consideration of the appellate court. Whenever error is apparent upon the record, it is open to revision, whether it be made to appear by bill of exceptions or in any other manner. Suydam v. Williamson et al. 20 How. 427, 15 L. Ed. 978. And it was specifically held in Aurora City v. West, 7 Wall. 82, 19 L. Ed. 42, that, irrespective of the bill of exceptions, the writ of error brings up for review the decision of the court below in overruling a

demurrer. See, also, Young v. Martin, 8 Wall. 354, 357, 19 L. Ed. 418."

These decisions are declaratory of the common law. At common law, the ruling of the court upon a demurrer to a pleading has always been a proper subject of review upon error by the appellate court. This was true before a bill of exceptions was known. It was true when the higher court had no power to consider upon writ of error anything at all except those matters which appear upon the face of the record.

Prior to the enactment of the first English statute providing for a bill of exceptions, the only court which had the power to consider any external question of *fact* was the trial court itself. This was by writ of error *coram nobis* or *coram vobis*.

Pickett's Heirs v. Legerwood, 7 Pet., 144.
Stephen on Pleading (Tyler's Ed.), p. 142.

In other words, if any question of *fact* was to be considered upon writ of error, that could only be done under the writ of error *coram nobis*. This writ of error, like the writ of error proper, was sued out of chancery, commanding the judges of the trial court themselves to examine the record, and this the trial court had the power to do, in the light of the external facts which were produced in connection with such review. The same result sought to be accomplished by writ of error *coram nobis*, anciently, has been accomplished in modern times by a motion supported by affidavits. The writ of error proper, however, though issued in the same way, commanded the judges

to send the record to the court of appellate jurisdiction, and the appellate court was able to review every question of law which appeared on the face of the record, but was unable to consider any question of fact whatever.

This condition continued until the time of the reign of Edward I. In his reign the statute of Westminster 2, 13 Edw. I., c. 31, was enacted. Thereby provision was made for questions of fact and the rulings of the court thereon, which were presented and made in the course of the trial, to be incorporated into a bill of exceptions. This bill of exceptions the trial judge was required to seal. Thus the facts and decisions thereon, which were embraced within the bill of exceptions, were made to become a part of the record, and the ruling set forth therein became subject to review upon writ of error by the appellate court, just as it had always reviewed the questions of law arising upon the face of the record.

The bill of exceptions, therefore, in its origin and purpose, when properly prepared, embraced matters which were exclusively *dehors* the record. It in no respect changed the law as to what was already in the record. With such matters the bill of exceptions had no connection whatever. Those matters, prior to the statute of Westminster, had always been subject to review upon writ of error. They continued to be subject to review in the same way. The single and sole purpose of the bill of exceptions was to put extraneous matters presented or occurring at the trial upon the record, in order that issues of law arising thereon might also be considered by the appellate court.

In Coke upon Littleton, volume 1, in a note to section 155b, it is said:

> "And, as a check to the judge in the discharge of this duty, either party may, under the statute of Westminster 2, c. 31, make his exception in writing to the judge's direction, and enforce its being made a part of the record, so as afterwards to found error upon it."

Stephen on Pleading (Tyler's edition), at page 142, says:

> "When a writ of error is obtained, the whole proceedings to final judgment inclusive, are then always actually *entered* (if this has not before been done) on record, and the object of the writ of error is to reverse the judgment for some *error of fact or law* that is supposed to exist in the proceedings *as so recorded.*"

The author then proceeds to show that if it be an error of fact, the review can only be had by the writ of error *coram nobis*, and continues:

> "But the most frequent case of error is when, upon the face of the record, the judges appear to have committed a mistake *in law.* This may be by having *wrongly decided an issue in law* brought before them by demurrer, but it may also happen in other ways. As formerly stated, the judgment will in general follow success in the issue. It is,

however, a principle necessary to be understood, in order to have a right apprehension of the nature of writs of error, that the judges are, in contemplation of law, bound, before in any case they give judgment, to *examine the whole record*, and then to adjudge either for the plaintiff or defendant, according to the legal right as it may on the whole appear, notwithstanding, or without regard to, the issue in law or fact that may have been raised and decided between the parties; and this, because the pleader may, from misapprehension, have passed by a material question of law without taking issue upon it. Therefore, whenever, *upon examination of the whole record*, right appears on the whole not to have been done, and *judgment appears to have been given for one of the parties when it should have been given for the other*, this will be an *error in law*. And it will be equally error, whether the question was raised on *demurrer*. * * * But * * * nothing will be error in law that does not appear *on the face of the record;* for matters not so appearing are not supposed to have entered into the consideration of the judges. Upon error in *law*, the remedy is not by writ of error *coram nobis* (for that would be merely to make the same judges reconsider their own judgment), but by a writ of error, requiring the record to be sent into some other court of appellate jurisdiction, that the error may be there corrected, and called a writ of error generally."

Blackstone, in his Commentaries, volume 3, at page 372, gives the following account and purpose of the above-mentioned statute:

> "The oath administered to the witness is not only that what he deposes shall be true, but that he shall also depose the *whole* truth: so that he is not to conceal any part of what he knows, whether interrogated particularly to that point or not. And all this evidence is to be given in open court, in the presence of the parties, their attorneys, the counsel, and all bystanders, and before the judge and jury; each party having liberty to except to its competency, which exceptions are publicly stated and by the judge are publicly allowed or disallowed, in the face of the country: which must curb any secret bias or partiality that might arise in his own breast. And if, either in his directions or decisions, he misstates the law by ignorance, inadvertence or design, the counsel on either side may require him publicly to seal a *bill of exceptions;* stating the point wherein he is supposed to err: and this he is obliged to seal by statute Westm. 2, 13 Edw. I., c. 31, or, if he refuses so to do, the party may have a compulsory writ against him, commanding him to seal it, if the fact alleged be truly stated: and if he returns, that the fact is untruly stated, when the case is otherwise, an action will lie against him for making a false return. This bill of exceptions is in the nature of an appeal; examinable, not in the

court out of which the record issues for the trial at *nisi prius*, but in the next immediate superior court, upon a writ of error, after judgment given in the court below."

In Encyclopaedia of Pleading and Practice, volume 3, at page 378, it is said:

"Prior to the statute of Westminster (13 Ed. I., c. 31), the only errors reviewable at common law on a writ of error were those apparent on the face of the record proper. The record proper consisted of the pleadings, process, verdict and judgment. Exceptions to rulings of the court during the progress of the trial were not brought up, as the oral or parol matters on which they were based were not incorporated in the record. The bill of exceptions being, accordingly, purely a creation of statute and unknown to the common law, it cannot be extended to cases not within the contemplation of the statute. The statute of Westminster was applicable only to civil cases sued in courts following the common law."

At page 404 of the same volume it is said:

"It is a general rule of appellate procedure that a bill of exceptions is useless, and indeed none should be brought up to the appellate court, where all the facts constituting the alleged error appear on the face of the record proper. The reason for this

rule is obvious, since the only purpose of the bill is to bring before the court in an authenticated manner facts which in the ordinary course of proceeding would not otherwise appear of record in the case."

We ask permission to cite from the Supreme Court of Florida an interesting discussion of the question, in the case of Barnes v. Scott, 11 Southern Reporter, page 48, where the court says:

"While the rule is well settled that exceptions must be taken and noted to all rulings of the court below that it is desired to have reviewed here, when such rulings are made during the progress of a trial concerning matters *in pais*, that are not and can never be a part of the record in the case, unless made so by bill of exceptions duly made up and authenticated by the signature and seal of the judge presiding, yet this rule, upon a writ of error, does not apply to rulings that are apparent upon the face of the record, and that are, per force of their very nature, a part of the record itself, and that appear from a simple transcript of the papers and proceedings that compose the record proper of the cause, without the help or addition of a bill of exceptions—such, for instance, as the rulings of the court upon demurrers to the different pleadings. When the matter submitted to the court for its decision, and the ruling thereon, is made to appear as a part of the legitimate record

proceedings in the cause, leading up as steps to the formation of the issues therein, then as to such matters there is no necessity for any exception in order to have it reviewed here, because in such cases a bare transcript of the papers filed in the cause, and that compose within themselves that which is the record of such cause, and the rulings of the court thereon, would upon their face exhibit the matter to be reviewed here without the aid of a bill of exceptions to make it appear. The distinction as to when it is and when it is not necessary to take or note exceptions to rulings upon which a review is desired, is thus very clearly put in Pow. App. Proc., p. 215:

'The only object of a bill of exceptions is to bring into the record the facts and the decision of the court, where it would not otherwise appear therein. Sometimes, when a matter transpires or a decision is casually made, and its objectionable character not readily perceived, the party is required to make his objection at the time in order to enable the matter to be corrected, if it is chosen to be, for otherwise it may be presumed that the matter was assented to or waived. But where a question is directly raised to the court to respond to it, as upon a demurrer, * * * no bill of exceptions is necessary.' "

We again wish to emphasize the fact that an exception is not to be separated from the bill of excep-

tions. If the former is necessary, the latter affords the only means of preserving it. It is true that a practice prevails in some states, as we are advised—certainly in Kentucky and probably in Wyoming—of appending to a judgment a form of exception, but this is a practice wholly unknown to the common law, and is of no importance here, except as it may serve to illustrate the danger of the federal courts falling into errors by inadvertently adopting the state practice.

It seems to us that no argument is necessary to show that the practice under discussion should be uniform in all of the courts of the United States. The rule adopted by the Supreme Court should prevail in all of the other federal appellate courts.

Hopkins, in his New Federal Equity Rules, at page 11, well said:

> "The primary object of all rules is to secure uniformity in practice. They relate to the adjective, not to the substantive, law. * * * Every lawyer wishes to comply with the rules of court. The difficulty of learning what the rules, written and unwritten, are, consumes much valuable time, which were better devoted to the merits of the controversies in the courts. * * * When the rule is clear, and courts deliberately depart from it, the result is an unfair embarrassment of the bar."

We assume that every conscientious member of the bar stands in more or less dread of the possibility

of some omission on his part resulting in the refusal of the court to pass upon the merits of his client's cause of action or defense. No lawyer is held blameless who fails to follow that procedure prescribed by the court, and made a condition precedent to the right to adjudicate the real issues of the controversy. We yield to no one in the sense of responsibility attaching to a lawyer in this respect. In an effort to know the proper practice and procedure upon the question under discussion, we have spared no pains. We have examined into every known source of information upon the subject—the statutes of the United States, the rules of this court and of the Court of Appeals, the common law, the decisions of this court, the practice in the Court of Appeals, and, finally, the history, including the origin and office, of the bill of exceptions. A careful examination of these subjects can lead to but one conclusion. That conclusion this court reached long before the courts of appeal were established, and that conclusion became a recognized, though unwritten, rule of procedure in all of the federal courts, without a single exception, so far as we have been able to discover, until the decision in this case. Our failure, therefore, to reserve an exception to the ruling of the trial court upon the demurrer to the third defense was no mere inadvertence. We deliberately failed to reserve an exception, for the reasons which we have herein set forth, being confident that to save such an exception was to evince an ignorance of the decisions of this court, and the rule of the common law on the subject, and would merely result in encumbering the record, and adding to the ultimate cost of the unsuccessful litigant by un-

necessarily and without authority bringing into the record, or pretending to bring into the record, by bill of exceptions, matters which already constituted and were a part of the record, and apparent on the face thereof.

With respect to a rule of practice which has prevailed from time immemorial, changes may become necessary. As respects the rule under consideration, we respectfully submit, however, that no reason based upon principle, convenience, or necessity can be given for its abrogation. In any event, if a rule of such long duration and uniform recognition is to be abrogated, the new rule, whether made by statute, written or unwritten rule of the court, should never be permitted to become retroactive in its operation. The adjective law, no less than the substantive law, if changed during the course of litigation, and made retroactive with respect thereto, proves disastrous to the rights of the litigant, and violates the spirit, if not the letter, of the Constitution of the United States. We urge, however, that there is no reason why any change should be made in the rule under discussion, and we express the hope that the additional burdens necessarily incident to such change, in preparation for reviews upon writs of error, will not unnecessarily be imposed upon the profession. In the interest of harmony in the practice and procedure in the federal courts of the United States, and in justice to our client, we respectfully urge that the new rule announced and enforced by the Circuit Court of Appeals in the case at the bar may be disapproved, and the rule once more announced by this tribunal in accordance with its previous declarations upon this important subject.

SECOND POINT.

THE THIRD DEFENSE RAISES THE QUESTION AS RESPECTS THE POWER OR AUTHORITY OF THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER TO ISSUE NEGOTIABLE CERTIFICATES OF INDEBTEDNESS.

The third defense was prepared in the light of the constitutional and statutory laws of the State of Colorado with respect to the use of voting machines. Section 8 of Article VII of the Constitution of said state, among other things, provides as follows:

> "Nothing in this section, however, shall be construed to prevent the use of any machine or mechanical contrivance for the purpose of registering the votes cast at any election, provided that secrecy in voting be preserved."

Section 2341 of the Revised Statutes of Colorado of 1908, found also as section 5 of the Session Laws of Colorado of 1905 at page 222, reads as follows:

> "No voting machine shall be approved by the board of voting machine commissioners unless it shall be so constructed as to insure every voter an opportunity to vote in secrecy; that it can be closed during the progress of the voting so that no person can see or know the number of votes registered for any candidate or for whom the elector

has voted; that each machine shall be so constructed as to provide facilities for voting for the candidates of at least seven parties or organizations with a separate voting device and counter for each candidate thereof; that a straight party ticket can be voted by the operation of a single device; that the voter may vote for a part of one party ticket, and a part of one or more other party tickets; that a voter cannot vote for a candidate or on a question for whom or on which he is not lawfully entitled to vote; that the voter will be prevented from casting more than one vote for any candidate, or voting for more than one person for the same office, unless he is lawfully entitled to vote for more than one person therefor, and in that event permits him to vote for as many persons for that office as he is by law entitled to vote for, and no more, but all votes for nominated candidates for such officers shall be cast and counted in the same manner as for all other nominated candidates, except as hereinafter provided for presidential electors; that the machines will be provided with at least seven pairs of 'Yes' and 'No' counters for voting on questions, with the operating or voting devices therefor; that such machine will correctly register, by means of mechanical counters, having registering wheels, every vote cast for candidates whose names are printed on the ballot labels or for questions; that the names of the can-

didates for presidential electors shall not occur on the ballot labels, but in lieu thereof, one ballot in each party column, or row, shall contain only the words 'Presidential Electors,' preceded by the party name, and the names of the candidates for president and vice-president, and every vote registered for such ballot shall operate as a vote for all candidates of such party for presidential electors, and be counted as such, but it shall provide means for voting a split or irregular ticket for presidential electors; that any voter can by means of irregular ballots vote a written or printed ballot of his own selection for any person for any office, although such person may not have been nominated by any party, but such irregular balloting device or devices shall not be used for voting for any regularly nominated candidates, except for presidential electors, as herein provided; that a voter may readily understand how to vote, and within the period of one minute cast his vote for all the candidates of his choice and that he can change his vote for any regularly nominated candidate up to the time he starts to leave the machine. All voting machines shall have their voting devices for the individual candidates arranged in separate parallel party lines, one line for each party, and in parallel office rows, transverse thereto; each machine must be provided with a lock or locks, the keys of which can not be inter-

changeably used, and by the locking of which any movement of the operating machanism can be prevented, so that it can not be tampered with or manipulated for any fraudulent purpose; and that the doors of the compartment containing the registering mechanism can be locked so that no person can see or know the number of votes registered for any candidate; there shall be a counter, the registering face of which can be seen at all times from the outside of the machine, which will show during the election the total number of voters that have operated the machine at that election; there shall be a registering lock, or a counter, which can not be reset and will lock by the part that operates it, and will count up to a million; such lock or counter shall be known as a protective lock, or a protective counter, and shall be so constructed that the numbers on the lock will be changed or the number on the counter shall be advanced one every time the machine is operated. With each voting machine there shall be provided by the makers a working model for instruction of voters, which shall represent at least five office lines for two party rows, and the devices for voting for two questions, and shall correspond to the equivalent parts on the face of the voting machine, and the operation of the model shall be the same in outward appearance as the operation of the machine."

It will be observed that, under the provision of the Constitution above set forth, a ballot machine may not be used at all, unless of such character that the secrecy of the ballot is preserved. Among the various qualities which the statute requires in a voting machine are: (1) it must preserve the secrecy of the ballot; (2) it must be so constructed that an elector may cast his vote within the period of one minute; (3) it must be possible for an elector to vote a straight party ticket by the operation of a single device; (4) it must be possible for the elector to vote a mixed ticket; (5) it must not be possible for an elector to vote for a candidate or on a question for whom or on which he is not lawfully entitled to vote; (6) it must be possible for the elector to vote a split or irregular ticket for presidential electors; (7) it must be impossible, after the machine has been locked, for it to be tampered with or manipulated for any fraudulent purpose.

These provisions of the statute will be sufficient to render clear the sufficiency of the answer.

The third defense, set forth beginning at page 3, *supra*, and found at page 17 of the Record, alleges that the consideration for the certificate of indebtedness and interest coupon had wholly failed; that they were executed in part payment for voting machines; that under the agreement of purchase the Federal Ballot Machine Company had guaranteed that each of said machines would conform in every particular to the Constitution and statutes of the state with respect to the holding of elections by means of voting machines, and that they would perfectly and accurately perform the work of voting machines, as required by

said laws. It is then alleged that the machines do not conform in every particular to the requirements of the Constitution and statutes of the State of Colorado in respect to the holding of elections by means of voting machines, and do not perfectly or accurately perform the work as required by the Constitution and laws in that the secrecy of the ballot cannot be preserved; the mechanism of the said machine is so intricate and complicated that an elector cannot vote at all within the limit of one minute; it is impossible for an elector by the use of the said machines to vote a straight ticket, mixed ticket, or an irregular ticket, or any one of them, within the limit of one minute; it is impossible for an elector, by the use of the machine, secretly to vote a split or irregular ticket; the machines are so constructed that after they have been locked they are easily and readily manipulated in such a way as to render possible the placing of fraudulent ballots therein; the construction of the machine is such that an elector cannot cast a vote for presidential electors without first divulging the name of the person for whom he so desires to vote, and also that it is impossible for an elector to vote for any particular individual electors; where there are as many as seven tickets it is impossible for an elector to vote for an independent candidate, and it is impossible by the use of said machine to vote a straight ticket by a single device; the machines are so constructed that they do not prevent a voter from voting for a candidate or on a question for whom or on which he is not entitled to vote; and the machines do not correctly register every vote attempted to be cast either for candidates or on questions submitted to a vote.

Assuming these allegations to be true, as it must be assumed, in considering the answer upon demurrer, the machines are shown to be utterly worthless, in that they cannot be used at all without violating the law.

In other words, this third defense would have been an absolute bar to an action upon the certificate of indebtedness and interest coupon, if an action had been instituted thereon by the payee therein. The defense is equally a bar to the present action, if it be true that the certificate of indebtedness is not a negotiable instrument. The certificate of indebtedness is not a negotiable instrument, if, as a matter of law, the Board of County Commissioners of the City and County of Denver was without authority to issue a negotiable certificate of indebtedness.

Whether the Board of County Commissioners had authority to issue a negotiable certificate of indebtedness is purely a question of law. For us to have alleged that the Board of County Commissioners had no power or authority to issue negotiable certificates of indebtedness would have been to state a legal conclusion, in violation of an elementary principle of pleading. To interpose a defense to a complaint setting forth *in hacc verba* the instrument sued on, which is good only upon the theory that the instrument is not negotiable, always raises the question as to whether said instrument is negotiable in form. If executed by an agent and the power of the agent is one conferred by law, of which the court takes judicial notice, it equally raises the question as respects the authority of that agent to issue an instrument which shall be negotiable. If

it be said that the certificate sued on was in fact negotiable in form, we answer that, whatever the form, its effect must be determined in the light of the power or authority of the board which issued it. We repeat that this power and authority are to be determined, not upon any facts which the defendant might have alleged, but upon pure propositions of law of which the court takes judicial notice.

In the case of the ordinary agent whose authority is prescribed by contract, the person complaining of the exertion of an unauthorized power must allege the facts which show the act complained of to have been unauthorized, or must allege that the act complained of was in excess of the agent's authority. Where, however, the authority of the agent is prescribed by law, the court takes judicial notice of the extent of that authority, and if a power is exerted in excess of that conferred by law, the court, as a court, knows, without additional facts, that the act is void.

This serves to illustrate the difference between the rule of pleading, as applied to the ordinary agent whose powers are fixed by contract, and public officials, such as a board of county commissioners, whose powers are fixed and determined by law. Upon this principle of pleading the third defense merely alleged facts which established a failure of consideration—a defense which would have been valid as against the original payee of the certificate. This defense is also valid as against the plaintiff, though a *bona fide* holder in due course, if it be true in point of law that the certificate sued upon was non-negotiable for lack of power in the Board of County Commissioners to issue such a certificate.

It results, therefore, that we effectually answer any argument based upon the suggestion that the certificates are negotiable in form, when we show that the court, as a court, knows as a matter of law that the Board of County Commissioners had no power or authority to issue negotiable certificates.

Assuming, as to us seems clear and without question, that the third defense stated facts which would constitute a defense as between the petitioner and the original payee, the single additional question raised thereby was with respect to the authority of the Board of County Commissioners to issue a negotiable certificate of indebtedness. The very basis of the defense was the absence of power, under the laws of Colorado, in the Board of County Commissioners to issue a negotiable certificate, and if the certificate was negotiable in form, it was a palpable case of the exertion of an act by a public official in excess of the authority conferred by law.

The proposition that this defense properly raised the question as respects the authority of the Board of County Commissioners to issue a negotiable certificate of indebtedness was, so far as we know, never at any stage of the proceeding drawn in question, nor has it yet been drawn in question, except by certain possible inferences contained in the opinion of the Circuit Court of Appeals. But for certain language therein contained, we should not have felt that it was proper or necessary to advert to this question.

THIRD POINT.

NEITHER SECTION 8 OF ARTICLE VII OF THE CONSTITUTION OF COLORADO, NOR THE ACT OF 1905, AUTHORIZES THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER TO ISSUE NEGOTIABLE CERTIFICATES OF INDEBTEDNESS, AND THE CERTIFICATE AND COUPON SUED UPON, BEING NEGOTIABLE IN FORM, ARE THEREFORE ABSOLUTELY VOID.

Section 8 of Article VII of the Constitution of the State of Colorado, so far as material to the question now being discussed, provides as follows:

> "When the governing body of any county, city, city and county or town, including the city and county of Denver, and any city, city and county or town which may be governed by the provisions of special charter, shall adopt and purchase a voting machine, or voting machines, such governing body may provide for the payment therefor by the issuance of interest-bearing bonds, certificates of indebtedness, or other obligations, which shall be a charge upon such city, city and county, or town; such bonds, certificates or other obligations may be made payable at such time or times, not exceeding ten years from date of issue, as may be determined, but shall not be issued or sold at less than par."

Section 2342 of the Revised Statutes of Colorado of 1908, found also as section 6 of the Session Laws of Colorado of 1905, at page 224, so far as material, provides:

> "The governing body of any county, city, city and county or town, including the city and county of Denver, and any city, city and county or town which may be governed by the provisions of special charter, adopting and purchasing a voting machine, or voting machines, may provide for the payment therefor by the issuance of interest-bearing bonds, certificates of indebtedness or other obligation, which shall be a charge upon such county, city, city and county, or town; such bonds, certificates or other obligations may be made payable at such time, or times, not exceeding ten years from the date of issue, as may be determined, but shall not be issued or sold at less than par."

It is conceded that the Board of County Commissioners is the governing body of the City and County of Denver in its capacity as a county, and the certificate of indebtedness in question upon its face discloses that it was issued by the Board of County Commissioners.

It is to be observed that in both the Constitution and the statute the authority is to issue "interest-bearing bonds, certificates of indebtedness or other obligations." Aside from bonds and certificates of indebtedness, the only other obligations which the county might have availed itself of were probably

ordinary county warrants or promissory notes. When the Board of County Commissioners determined to purchase voting machines, under the authority thus granted by the Constitution and statute, they were permitted to provide for the payment therefor by the issuance of either (1) interest-bearing bonds, (2) certificates of indebtedness, or (3) warrants or promissory notes.

The municipal authorities apparently decided not to issue interest-bearing bonds, and not to evidence the debt of the Ballot Machine Company by warrants or notes, but selected, for the purpose of evidencing the obligation, the form of "certificate of indebtedness" hereinabove set out. For the purpose of this case we may therefore eliminate from the constitutional and statutory provisions any reference to bonds or municipal obligations other than certificates of indebtedness. Accordingly, the authority under which the Board of County Commissioners acted, when it issued the certificate sued on in this case, was the grant of power to issue certificates of indebtedness. If the constitutional and statutory provision conferred upon the county officials any larger powers, they did not choose to avail themselves of them. Does, then, a grant of power to a municipality to issue certificates of indebtedness carry with it by necessary implication the power to make such certificates negotiable?

It is common learning that municipal corporations are merely agents of the state government for local purposes, and possess only such powers as are expressly given or necessarily implied, because essential to carry into effect such as are expressly granted,

and that the bonds or other obligations of such corporations are void unless there be express or implied authority to issue them.

Barnett v. Denison, 145 U. S., 135.
Ottawa v. Carey, 108 U. S., 110.
Merrill v. Monticello, 138 U. S., 673.
Nashville v. Ray, 19 Wall., 468.

As said in the case of Brenham v. Bank, 144 U. S., 173:

> "Any doubt as to the existence of the power of a municipality ought to be resolved against its existence."

It must be conceded that the grant of authority contained in the above provisions of the Constitution and statutes of the State of Colorado to issue certificates of indebtedness was not an *express* grant of power to issue *negotiable* certificates of indebtedness. If the Board of County Commissioners of the City and County of Denver had any authority whatever to issue a negotiable certificate of indebtedness which would circulate as commercial paper, and deprive the county of any defense which it might have against the payee therein named, it can only be by virtue of some implication which the court shall deduce from the language of the grant of power as being necessary to carry out the intent of said laws.

It is now well settled that the grant of power to a municipal corporation to borrow money, or to contract an indebtedness, carries with it power to issue

bonds or other instruments evidencing the loan or indebtedness, but does *not* authorize the municipality to issue *negotiable* bonds.

Merrill v. Monticello, 138 U. S., 673.

City of Brenham v. German American Bank, 144 U. S., 173.

National Bank v. School District, 56 Fed., 197.

German Insurance Co. v. City of Manning, 95 Fed., 597.

In the case of City of Brenham v. German American Bank, *supra*, the city council of the town of Brenham, in the State of Texas, was given the power and authority to borrow for general purposes not to exceed $15,000, on the credit of the city. This grant of power was contained in section 2 of an act of the legislature of Texas, passed in 1873, incorporating the city of Brenham. One of the sections of the same act provided that the *bonds* of the city of Brenham should not be subject to the tax under this act. The court held that, under its grant of power to borrow money, the city could give to the lender, as a voucher for the repayment of the money, evidence of the indebtedness in the shape of non-negotiable paper, but there was nothing in the language of the charter which could be construed, either expressly or by implication, to confer the power to issue negotiable interest-bearing bonds. The court said:

> "It is easy for the legislature to confer upon a municipality, when it is constitutional to do so, the power to issue negotiable

bonds, and under the well-settled rule that any doubt as to the existence of such power ought to be determined against its existence, it ought not to be held to exist in the present case."

The following language of Mr. Justice Lamar, in the case of Merrill v. Monticello, *supra*, was cited with approval:

"It is admitted that the power to borrow money or to incur indebtedness, carries with it the power to issue the usual evidences of indebtedness by the corporation to the lender or other creditor. Such evidences may be in the form of promissory notes, warrants, and perhaps most generally in the form of a bond. But there is a marked legal difference between the power to give a note to a lender for the amount of money borrowed, or to a creditor for the amount due, and the power to issue for sale in the open market a bond as a commercial security, with immunity in the hands of a bona fide holder for value, from equitable defense. * * * It does not follow that, because the town of Monticello had the right to contract a loan, it had therefore the right to issue negotiable bonds, and put them on the market as evidences of such loan. To borrow money and to give a bond or obligation therefor, which may circulate in the market as negotiable security, free from any equities that may be set up by the maker of it, are, in their nature

> and in their legal effect, essentially different transactions. Nowhere in the statute is there any express power given to issue negotiable bonds as evidence of such loan, nor can such power be implied, because the existence of it is not necessary to carry out any of the purposes of the municipality."

If the Board of County Commissioners in the present case had issued bonds instead of certificates of indebtedness, we should have had no little difficulty, under the authority of the Brenham and Monticello cases, *supra*, in understanding how the mere grant of power to issue bonds could carry with it the power to issue *negotiable* bonds. If the power to borrow money by necessary implication carries with it the power to evidence the loan by the issuance of a bond, it seems to us that the power construed in the Brenham and Monticello cases, coupled with this necessary implication, is precisely equivalent to the power to issue bonds, and whether the power granted was to issue bonds or to borrow money, the municipality would be without authority to make such bonds negotiable, in the absence of an additional grant conferring that specific power.

In the case of West Plains v. Sage, 69 Fed., 943, it was held by the United States Circuit Court of Appeals of the Eighth Circuit, in an opinion by Judge Sanborn, Judge Thayer concurring and Judge Caldwell dissenting, that an express power to issue bonds carries with it by implication the power to issue negotiable bonds. Judge Sanborn said:

> "The act under consideration in this case authorized this township to issue new bonds, without any restriction as to their negotiability. This grant of power to a municipal body to issue bonds must be interpreted to give that body power to issue municipal bonds in the usual form of such securities. The usual—nay, it may almost be said, the universal—form of such securities is that of a negotiable bond, payable to bearer, and in our opinion it was bonds in this form, and in no other, that the legislature of Kansas had in mind, and intended to give this township power to issue by this act."

We submit that this reasoning ignores the inevitable logic of the cases above cited. If this reasoning is correct, it is equally correct to say that the express power to borrow money carries with it by implication the power to issue that form of security in evidence thereof which is usual or almost universal in commercial transactions.

This court, however, recognizing the strict rule determining the power of municipalties, has held that the authority to borrow money will authorize the issuance of a bond in evidence thereof, but not a negotiable bond. Now, what is necessarily implied is the same as if it had been expressly granted, and if the power to borrow money by necessary implication carries with it the power to issue bonds, then expressly to confer the power to issue bonds is to do no more than was necessarily implied in the power to borrow money.

In other words, the power with respect to the issuance of bonds, when that single and sole power is expressly conferred, carries with it no greater power than was carried by necessary implication when the power to borrow money was expressly conferred. If in the latter the power to issue bonds does not mean the power to issue negotiable bonds, then the former, while authorizing the issuance of bonds, will not carry by implication the power to issue negotiable bonds.

Judge Caldwell, in his dissenting opinion in the Sage case, obviously took this view. He said:

> "It is obvious that no recovery can be had on the bonds in suit, if we apply to the facts of this case the well settled rules of law relating to the power of municipal corporations to issue bonds, and the rules which determine when such corporations are and when they are not precluded from availing themselves of meritorious defenses to such obligations."

After reviewing various decisions of this court, and something of the history of legislation in the State of Kansas, Judge Caldwell continues:

> "Under a carefully guarded act, which bears evidence in its every line of a settled purpose on the part of the legislators to limit the powers of the officers acting thereunder to the issue of non-negotiable bonds in compromise of the then existing indebtedness of the municipalities of the state, the majority of

the court hold that it is open to the officers of every county, city, town, school district, and township in the state of Kansas to issue the negotiable bonds of the public corporations named, without any consideration, and for all manner of illegal purposes, and to any amount, and make them binding obligations by simply inserting in them the false recital that they were issued under the act mentioned; and that the purchasers of such bonds are not chargeable with notice of the requirements of the act under which they purport to be issued, nor with notice of what the records of the municipality disclose in relation to their issue. This is going much further than the supreme court of the United States has ever gone, and is in palpable conflict with the later decisions of that court which are cited in this opinion."

Regardless, however, of what kind of a bond might have been issued, the fact is, the Board of County Commissioners did not attempt in this case to issue a bond at all; it only pretended to issue a certificate of indebtedness. So far as this case is concerned, therefore, it is only necessary to consider whether the power to issue certificates of indebtedness carries with it by implication the power to issue negotiable certificates of indebtedness.

A bond is a form of obligation well known in the commercial world, and the form in use for the different classes of securities has become more or less stereotyped. It is no doubt for this reason that Judge

Sanborn said, in the Sage case, *supra*, that the grant of power to a municipal body to issue bonds must be interpreted to give that body power to issue municipal bonds in the usual form of such securities. A municipal certificate of indebtedness, on the other hand, is not a commercial instrument, commonly understood to be negotiable. The term itself cannot be said to have any popular or ordinary significance. The mere acknowledgement of receipt of property purchased by the county, and the amount due, would be a certificate of indebtedness, but would certainly not be negotiable.

Conceding, therefore, for the purpose of the argument, and not otherwise, that the power to issue bonds carries by implication the power to issue negotiable bonds, upon the theory that that is the popular signification of the term "bond," unless restricted by express words, yet for the very same reason a grant of power to a municipality to issue certificates of indebtedness cannot fairly be said to be a grant of power to issue negotiable certificates of indebtedness.

If, in its popular meaning, the term "certificates of indebtedness" connotes any idea at all as to negotiability, it will probably be a general idea that such an instrument in non-negotiable. Moreover, if conjectures are to be indulged in as to whether the power to issue certificates of indebtedness confers the right to make them negotiable, and there are no countervailing considerations, as in the case of bonds, which it is claimed have a well-known and usual form, then, under well-settled rules of construction, the existence of the power must be resolved against the municipality.

We submit, therefore, that the case of West Plains v. Sage, *supra*, is not only not decisive of this contro-

versy, even conceding its soundness, but, indeed, is not in point at all. The power to issue certificates of indebtedness differs quite as radically from the power to issue bonds as the power to issue bonds differs from the power to borrow money. Indeed, the power to borrow money has been repeatedly construed to imply the power to issue bonds; but we think the books can be searched in vain for a statement from any tribunal that the power to issue bonds is equivalent to or implies the power to issue certificates of indebtedness. Certainly no express power was granted to the City and County of Denver to issue *negotiable* certificates of indebtedness, nor can it be said that such obligations have any customary and usual form which is negotiable. On the contrary, any acknowledgment of a debt, as above indicated, even if it be nothing more than a mere receipt, would be a certificate of indebtedness. When we add, therefore, to the popular conception that a certificate of indebtedness is probably not negotiable, the rule of construction that every presumption is to be indulged against the existence of a power not necessarily granted or implied, the result seems to lead inevitably to the conclusion that the statutes and Constitution of Colorado conferred no power upon the Board of County Commissioners of the city of Denver to issue negotiable certificates of indebtedness.

In the case of National Bank v. School District No. 7, 56 Fed., 199, Judge Thayer, speaking for the Circuit Court of Appeals of the Eighth Circuit, and referring to the case of Brenham v. Bank, *supra*, said:

> "It is unnecessary for us to assert that the decision last referred to goes to the full

extent last indicated of holding that a municipal corporation can only acquire authority to issue negotiable securities by a statute which confers such power in express language, and that the power will not be implied under any circumstances. We think, however, that we may fairly affirm that the two authorities heretofore cited do establish the following propositions: first, that an express power conferred upon a municipal corporation to borrow money for corporate purposes does not in itself carry with it an authority to issue negotiable securities; second, that the latter power will never be implied in favor of a municipal corporation, unless such implication is necessary to prevent some express corporate power from becoming utterly nugatory; and, third, that in every case where a doubt arises as to the right of a municipal corporation to execute negotiable securities, the doubt should be resolved against the existence of such right."

In Coffin v. Board of County Commissioners, 57 Fed., 139, Judge Thayer, again speaking for the Circuit Court of Appeals of the Eighth Circuit, said:

"Finally, it is proper to call attention to the rule of law which requires the authority of a municipal corporation to issue negotiable paper to be clearly made out and established, whenever the existence of such a power is called in question. A power of that

> nature will not be deduced from uncertain inferences, and can only be inferred from language which leaves no reasonable doubt of an intention to confer it."

Certainly the power to issue certificates of indebtedness cannot be said beyond any reasonable doubt to confer the power to make such certificates negotiable, especially when the effect of such a rule is utterly to deprive taxpayers of a municipality of any defense against the collection of obligations, such as the certificate in question, although the consideration for the issuance of such an obligation has utterly failed.

In this case, if the court should hold the certificate of indebtedness in question void as a negotiable instrument, beyond the power of a municipality to issue it, the plaintiff cannot be injured if the county has ever received any consideration for the issuance of this large amount of securities. The creditor may recover, as for goods sold and delivered, and the holders of a void certificate of indebtedness will be subrogated to the rights of the creditor. The only practical effect of a decision in favor of the validity of the certificate of indebtedness in question would be to deprive the county of a valid defense against a worthless purchase.

It is, of course, well settled that if a municipality issues bonds or other obligations, negotiable in form, when no power has been conferred to utter negotiable instruments, the securities are void, and no recovery can be had on them as non-negotiable instruments. If the City and County of Denver had no authority to issue negotiable certificates of indebtedness, and the

certificates so issued were negotiable in form, they were absolutely void for all purposes. A recovery might be had for goods sold and delivered, but no action can be predicated upon the obligation itself.

Mayor v. Ray, 19 Wall., 468.
Merrill v. Monticello, 138 U. S., 673.
Hedges v. Dixon Co., 150 U. S., 182.
Swanson v. Ottumwa, 131 Ia., 547.

FOURTH POINT.

EVEN IF THE CONSTITUTIONAL PROVISION AND STATUTE IN QUESTION SHOULD BE HELD TO AUTHORIZE THE ISSUANCE OF NEGOTIABLE BONDS, THE SECURITY SUED ON IN THIS ACTION IS NOT A BOND, IS NOT NEGOTIABLE, AND THEREFORE THE PLAINTIFF TOOK IT SUBJECT TO ANY EQUITIES EXISTING BETWEEN THE COUNTY AND THE PAYEE.

Moreover, a municipal certificate of indebtedness, even though negotiable in form, has been repeatedly held not to be a negotiable instrument in the sense that any defense which the municipality may have against the payee will be cut off by a transfer for value before maturity to a *bona fide* purchaser.

A certificate of indebtedness and a county warrant are to be distinguished from county bonds. A bond is a new debt, or constitutes the evidence of a new debt, while a warrant or certificate of indebtedness is merely the evidence of a debt already con-

tracted. This distinction runs through the cases, and is clearly stated by Judge Dillon in the fifth edition of his work on Municipal Corporations, volume 2, page 1284, as follows:

> "The warrant does not constitute a new debt, or evidence of a new debt, but is only the prescribed means for drawing money from the municipal treasury to pay an existing debt. State v. Cook, 43 Neb. 318. It may also be laid down that, as a general rule, the power to issue a warrant does not exist until the audit and allowance of the claim in the manner prescribed by statute."

At page 1273 of the same volume, the opening paragraph of the chapter on Warrants on Municipal Treasury reads as follows:

> "Orders or drafts drawn by one city officer upon another, and vouchers for moneys due, certificates of indebtedness for services rendered or for property furnished for the use of the city, or any device of the kind, issued for liquidating the amounts due to the public creditors, are necessary instruments for carrying on the machinery of municipal administration, and for anticipating the collection of taxes."

It is to be observed that Judge Dillon treats warrants, vouchers for money due, and certificates of indebtedness as the same class of obligations. The certificate of indebtedness in question recites on its face

that, a claim having been presented against the City and County of Denver for voting machines, and the claim having been allowed for the amount of the certificate, the obligation was issued to evidence the existence of the debt. Unlike a bond, it did not, to use the language of Judge Dillon, constitute a new debt or evidence of a new debt, but was simply the means of drawing money from the municipal treasury to pay an existing debt.

In the case of Watson v. City of Huron, 97 Fed., 449, Judge Caldwell, delivering the unanimous opinion of the Circuit Court of Appeals of the Eighth Circuit, said:

> "But the certificates of indebtedness issued in this case are not negotiable bonds, but mere warrants or orders of the city treasurer, directing him to pay to the holder thereof the sum of money out of funds in the treasury. Such instruments are not subject to the rules of the law merchant, or in any manner to be treated like negotiable bonds. Whatever differences of opinion may have existed among the courts fifty years ago, as to the negotiability of such warrants, the courts are now unanimous that, while such warrants establish prima facie the validity of the claims allowed, and authorize their payment, they have no other effect; that they are in form negotiable, and transferable by delivery, so far as to authorize the holder to maintain in his own name an action on them, but they are not negotiable instruments in the sense of the law merchant, so that, when

held by a bona fide purchaser, evidence of their invalidity or defenses available against the original payee would be excluded."

In the case of Nashville v. Ray, 19 Wall., 468, Mr. Justice Bradley also speaks of vouchers for money due, certificates of indebtedness, orders, warrants, and drafts as being comprised within the same class of municipal obligations. In this case he used the following language:

"Vouchers for money due, certificates of indebtedness for services rendered, or for property furnished for the uses of the city, orders or drafts drawn by one city officer upon another, or any other device of the kind, used for liquidating the amounts legitimately due to the public creditors, are, of course, necessary instruments for carrying on the machinery of municipal administration, and for anticipating the collection of taxes; but to invest such documents with the character of commercial paper, so as to render them in the hands of bona fide holders absolute obligations to pay, however irregularly or fraudulently issued, is an abuse of their true character and purpose. It has the effect of converting a municipal organization into a trading company, and puts it in the power of corrupt officials to involve a political community in irretrievable bankruptcy. No such power ought to exist, and in our opinion no such power does legally exist, un-

less conferred by legislative enactment, either express or clearly implied."

In Dillon on Municipal Corporations, fifth edition, volume 2, page 1295, it is said:

"The question whether there is any implied power in the officers of a town, county or city corporation to issue warrants or orders which shall be free from equities in the hands of holders, has been disposed of by a long line of decisions, which denies warrants or orders the principal attribute of negotiability, that is, freedom in the hands of bona fide transferees from equities in favor of the municipality. This result is arrived at as much by reason of the object or purpose intended to be attained by these instruments, as by a consideration of the lack of power inherent or implied on the part of municipalities to make and issue negotiable instruments without clear statutory authority therefor. * * * It would overwhelm municipalities with ruin to hold that such warrants or orders have the quality of negotiable paper, especially that quality which protects an innocent holder for value from defenses of which he has no notice, actual or constructive. All holders of such warrants or orders, even when payable to order of bearer, stand in the shoes of payee, and their rights and remedies are often essentially different from those of the holders of authorized negotiable municipal bonds. Such is the

sound doctrine, and such is the doctrine of the authorities without exception."

As has been said, Judge Dillon, when speaking of warrants and orders, seems to include also ordinary municipal vouchers or certificates of indebtedness, and to distinguish such securities from municipal bonds, in that the latter evidence a new debt, while the former are merely evidences of debts already contracted, or claims against the municipality already allowed.

It seems to us, therefore, unquestionable that the certificate of indebtedness in question in the instant case was intended by the municipal authorities to be an obligation radically different from a municipal bond. The certificate recites on its face that the debt for which it is issued had already been contracted, and the claim against the county had already been allowed. The certificate was intended to evidence the existence of that obligation, and seems to us, so far as its negotiability is concerned, to differ in no essential particular from a municipal warrant. The fact that it contains all the elements of negotiability is immaterial. Municipal warrants may also be negotiable in form, but the courts will assume, in the absence of some clear and unequivocal grant of authority, that a municipality is without power to make negotiable its warrants or certificates for debts already contracted.

If a municipality proposes to borrow money, there is some reason for implying the power to issue negotiable bonds to evidence the new debt; but if the debt has already been contracted, there is no reason what-

ever for conferring or implying the power to issue negotiable instruments in payment therefor. After a claim has been allowed against a county, the claimant is merely a simple contract creditor, and for the municipal officials to be permitted to discharge simple contract debts by the issuance of negotiable paper, which may pass into innocent hands, and thereby preclude any defenses which the county may later on discover, is not only the worst kind of business, but a principle of law which, we submit, should cause this tribunal long to hesitate before writing it into the jurisprudence of this country.

As said by Mr. Justice Bradley in Nashville v. Ray, *supra*, to do so "has the effect of converting a municipal corporation into a trading company, and puts it in the power of corrupt officials to involve the community in irretrievable bankruptcy."

In conclusion, we desire to call the court's specific attention to the allegations of the defendant's answer as set out on pages 17 and 18 of the Record. A hasty perusal of this defense, upon which the county proposes to rely, cannot fail to impress the court with the pernicious effect of a decision in this or similar cases that securities of the kind sued on in this case are negotiable.

Assuming, as we must, under the allegations of the third defense, that the consideration for the certificate in question has utterly failed, to hold the instrument in question negotiable is giving solemn sanction to the flotation by municipal officials, without any vote of the electors, of a large amount of

securities, merely evidencing the existence of a debt already contracted, and due at the date of their issuance, and against which the county later discovers it has a complete defense. The disastrous consequences of such a doctrine cannot well be exaggerated.

This consideration is particularly impressive in the light of Judge Caldwell's remarks in his dissenting opinion in the Sage case, *supra*. As that learned judge well said, if the county owes the money evidenced by the security in question, a recovery may be had by the creditor without reference to the instrument evidencing the obligation for goods sold and delivered, and the holder of the certificate of indebtedness in this case would be subrogated to the rights of the creditor. If the county, however, obtained nothing in exchange for the obligation here sued on, and consequently owes nothing in good morals, then to hold this certificate negotiable is to encourage the issuance by corrupt officials, with limited and restricted powers, of commercial paper, immune from any defense in the hands of *bona fide* holders for value.

Respectfully submitted,

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